Supreme Court, U.S.
FILED
No. D/41921 MAY 22 1995
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Sharon E. Pandak*
County Attorney
Gifford R. Hampshire
Assistant County Attorney
1 County Complex Court
Prince William, VA 22192
(703) 792-6620

Counsel for Petitioner
****Counsel of Record***

LAWYERS PRINTING COMPANY 7th & Franklin Bldg. Richmond, Virginia 23219 (804) 648-3664

55 pp

QUESTION PRESENTED

Whether promises to a local government of land, money and improvements, voluntarily made during a rezoning of land that is subsequently taken by the United States, constitute compensable property interests.

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IN THE SUPREME COURT
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BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

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v.
UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

The Board of County Supervisors of Prince William County, Virginia, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (App. *infra*, 1a-38a) is reported at 48 F.3d 520 (1995). The opinion of the United States Claims Court (App. *infra*, 47a-87a) is reported at 23 Cl. Ct. 205 (1991).

JURISDICTION

The United States Court of Appeals for the Federal Circuit entered judgment in this case on February 21, 1995. This Petition for a Writ of Certiorari was filed within ninety (90) days of February 21, 1995. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1)(1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Manassas National Battlefield Park Amendments of 1988, Title X of the Technical and Miscellaneous Revenue Act of 1988, Pub.L. No. 100-647, 102 Stat. 3342, 3810 (1988), (codified at 16 U.S.C. §§ 429b(b) (1988)). (App. *infra*, 88a-94a).

STATEMENT OF THE CASE

This is a case brought under the Manassas National Battlefield Park Amendments of 1988 (hereinafter the "Act") and the Fifth Amendment of the United States for payment to the Petitioner Board of County Supervisors of Prince William County, a political subdivision of the Commonwealth of Virginia (hereinafter "Petitioner" or "County"), of just compensation for its property interests taken pursuant to the

Act. The Act vested in the United States all right, title and interest, and immediate possession in property known as the "William Center Tract" (hereinafter the "Tract") in order to expand the Manassas National Battlefield Park. The Act provided for just compensation to the owners of *any* property taken, as required by the Fifth Amendment.

In 1986, Hazel-Peterson Company (hereinafter "Hazel") acquired the Tract, consisting of approximately 542 acres, for approximately $9.8 million. The Tract is located in western Prince William County, Virginia. At the time, it adjoined the Manassas National Battlefield Park. It was zoned for agricultural uses and was undeveloped.

Shortly after acquiring the property, Hazel applied to the County for a rezoning to increase the uses to which the land could be put. On November 18, 1986, the County rezoned the property to allow Hazel to build a large commercial and residential development (hereinafter the "Project"). The rezoning was conditioned upon Hazel's voluntary promises to the County to dedicate or convey to the County real and personal property and to devote portions of the Tract to specified uses. These voluntary promises are called "proffers."

"Proffers" are part and parcel of "conditional zoning" in Virginia. Va. Code Ann. § 15.1-430 (Michie 1989). They are reasonable conditions "in

addition to or modification of the regulations provided for a particular zoning district or zone by the overall zoning ordinance." They are voluntary promises by a landowner when the County considers a request for a rezoning. *Id.* As such, they often include voluntary promises to convey land to the County or promises to the County to dedicate land for certain purposes. The Code of Virginia authorizes Petitioner to accept these voluntary promises as part of the rezoning of the property in question. *See* Va. Code Ann. § 15.1-491(a) (Michie 1989). The specific promises by Hazel to the County were:[1]

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[1] Proffer numbers are taken from the original proffer document. The relevant proffers are set forth in the Appendix hereto. App. *infra*, 116a-126a.

#3 provision of natural and all weather trails;

#6 provision/construction of a community swimming pool/center, 2 tennis courts, 2 multi-purpose courts, multi-purpose ballfield, in specified locations;

#9 construction of William Center Boulevard; dedication of 4.5 acres on request of County and easements for construction of the Route 234 Bypass;

#10 construction of additional east bound and west bound lanes on Route 29 and a northbound lane on Route 234 at Route 234/Route 29 intersection; reconstruction/improvement of Groveton Road; construction of a southbound right turn lane at Route 621/Route 622 intersection; construction of right and left turn deceleration lanes at Route 29; upgrade William Center Boulevard; additional eastbound and westbound lane at Route 621/Route 622;

#14 contribution of $2 million toward construction of the I-66/Route 234 Bypass Interchange; and

> #20 provision of 5 acres for a fire station, commuter parking lot or other public facility.

Soon after Hazel started to construct the Project, the Act brought the Project to a halt and defeated the County's right to the above interests. Finding itself divested of the proffered land, money and recreational facilities, the County joined the other claimants in pursuing the just compensation required by the Act and the Fifth Amendment. The County filed suit in the United States Claims Court(hereinafter the "Trial Court") which had jurisdiction under the Act, the Fifth Amendment and 28 U.S.C. § 1491 (1988) to hear the County's claim for just compensation for the above

proffers as well as easements,[2] and street rights-of-way owned by the County in fee simple.[3] Although the United States ultimately settled with Hazel's successors by paying them *seven* times what Hazel paid for the Tract prior to the County's rezoning (App. *infra*, 127a), the County received nothing for the land, roadways, money and recreational facilities that resulted from the rezoning.

The Trial Court dismissed Petitioner's claim, stating that the proffers were not compensable property

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[2] The County ultimately withdrew its claims for easements.

[3] The United States Court of Appeals for the Federal Circuit agreed with Petitioner that the street rights-of-way owned in fee simple were compensable property interests and remanded that aspect of the litigation back to the Claims Court. Petitioner does not seek review of that portion of the Opinion.

interests under the Act and the Fifth Amendment. *Board of County Supervisors of Prince William County, Virginia v. United States*, 23 Cl. Ct. 205 (1991), App. *infra*, 47a. On appeal, the United States Court of Appeals for the Federal Circuit (hereinafter the "Court of Appeals") agreed with the Trial Court. 48 F.3d 520 (1995), App. infra, 2a. Focusing on what it perceived to be the purpose of the proffers, the Court of Appeals rejected the County's arguments that the proffers conferred on it rights sufficiently analogous to other compensable property rights to merit compensation under the Act. This Petition followed.

REASONS FOR GRANTING WRIT

Pursuant to Sup.Ct.R. 10.1(c), this Court should grant this Petition to review an important question of Federal law which has not, but should be, settled by the Court, *to wit*, whether "proffers" are compensable property interests under the Act and the Fifth Amendment. The opinions of the Trial Court and the Court of Appeals confirm that there is no law on this precise question anywhere in American jurisprudence. Proffers are an integral component of "conditional zoning"[4] which, as the Court of Appeals found, have been expressly authorized by the Virginia legislature. 48 F.3d at 524, App. *infra*, at 14a-15a. The result is

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[4] *See* pages 6-7, *supra*.

that many parcels of land throughout the Commonwealth are encumbered by proffers. In addition, the Act expressly required that *all* property interests be compensated. Thus, whether or not the proffers, voluntarily donated pursuant to conditional zoning, are property interests under the Act and Fifth Amendment should be settled by this Court. The question will reoccur anytime the Federal Government takes property that is encumbered with proffers.

In spite of the broad view that state and Federal courts have of property rights, the instant lower courts determined that the County's future interests were not within that broad category. The reasons given by

the Trial Court and the Court of Appeals run afoul of this Court's admonition in *United States v. 50 Acres of Land*, 469 U.S. 24 (1984), that public property owners should not be treated differently because of the different manner or context in which they acquire interests in property. By hearing this case, the Court would provide guidance to the lower courts on whether public property owners should be compensated differently under the Act or, more generally, the Fifth Amendment solely because of their status.[5]

Allowing the Court of Appeals' decision to stand will also justify other Federal courts in ignoring, in

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[5] Because of their nature, public bodies acquire property in a variety of ways and contexts that often differ from private landowners.

their analysis of takings, the law of the state in which the asserted property interest exists. The substance of what is compensable would be decided by application of fuzzy principles of economics, rather than what the highest state court had to say about what is property in that particular state. This would be particularly disturbing in a state like the Commonwealth of Virginia, whose common law is the oldest in the country and most closely tied to our English Common Law heritage.

1. If Unreviewed, the Court of Appeals' Decision Will Eviscerate the Long-Standing Rule that "Property" is Defined Broadly with Reference to State Law

The Court of Appeals properly framed the issue before it as "whether the County's right to enforce the

provisions of the proffer partake of the nature of those interests called 'property' for which compensation is due." 48 F.3d at 524, App. *infra*, 18a-19a. It also properly recognized that property can be said

> to encompass virtually any relationship among persons with regard to the "things" of the external world. And indeed, as every first year law student learns, property rights have been accorded with regard to a variety of things, ranging from intangibles such as corporate stock, poems, and the gathering of news, to wild animals, flowing water, pieces of outer-space waste, a lost brooch on a window sill, and dead bodies, and even to government benefits.

id., (footnote omitted) quoting Jesse Dukeminier and James E. Krier, *Property* 1-190 (3d ed. 1993); John E. Cribbet, Corwin W. Johnson, Roger W. Findley, Ernest E. Smith, *Property* 1-165, esp. c.

1 "What is Property" (6th ed. 1990); Sheldon F. Kurtz and Herbert Hovenkamp, *American Property Law* 1-44 (2d ed. 1993). *See also Goldberg v. Kelly*, 397 U.S. 254, (1970); *Lynch v. United States*, 292 U.S. 571 (1934).

Citing the need for the law to "draw lines," however, the Court of Appeals concluded that the proffers were not within the broad category of things that are regarded as property. 48 F.3d at 525, App. *infra*, 20a-24a. The reasons given by the Court of Appeals for drawing the lines to exclude proffers were: (1) that the "purpose" or "object" of the proffers was "not to give the County something of intrinsic value with which it could go into the market place and trade, or which it

could use and possess for County purposes"; (2) that "no title to any of these amenities and facilities passed to the County" or "were to be County property"; and (3) that there was nothing in the proffer document to suggest the amenities and facilities "were to be available to the County for its purposes apart from the need to meet the additional concerns caused by the developer's proposal itself."[6] *Id.* The Court of Appeals cited *no* case law in support of the reasons it gave for the placement of its "lines," but appears to

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[6] In footnote 11 of its opinion, the Court of Appeals noted that the five (5) acre fire station site might constitute an exception to this observation, but it was unclear whether title had been transferred to the County prior to the taking. The Court of Appeals gave the trial court permission to "sort this out," if asked on remand. As discussed, *infra*, actual transfer of title is irrelevant to analogous property interests such as materialman liens, restrictive covenants and future interests.

have decided that the novelty of the question required it to "make" new law according to dated and oblique economic concepts about "increased internalization." *See id.* 525 nn.9-10. If new Federal law is to be made about what constitutes a compensable property interest, it should be the doing of this Court, using the guideposts provided by existing, relevant case law.

a. State and Other Case Law Should Have Been Consulted

In making new Federal law, the Court of Appeals should have utilized guideposts in relevant state law. This Court has held that state law must be referenced in determining the meaning of "property" for the purposes of Federal takings. *See United States ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 279

(1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *see also Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). In the instant case, the law of the Commonwealth of Virginia should have been consulted in analyzing whether proffers are interests in property. Federal courts applying Virginia law follow this Court's rule in *United States v. General Motors*, 323 U.S. 373, 378 (1945), stating that a property interest includes not only traditional notions of real and personal property, but extends to benefits to which an individual may be deemed to have a legitimate claim of entitlement under existing rules or understandings. *First Charter Land Corp. v. Fitzgerald*, 643 F.2d 1011, 1014-1015 (4th Cir.

1981). In *General Motors*, this Court held that the Constitutional requirement of just compensation "is addressed to *every sort of interest* the citizen may possess." 323 U.S. at 378 (emphasis added). This Court should grant certiorari to provide guidance on whether conditional zoning proffers are within the wide range of interests this Court has determined to be compensable property interests.

b. Virginia Statutory Law Should Have Been Consulted

The focus of the Court of Appeals on the purpose for which property interests are created, and the result of that mechanism, also led it to discount the significance of proffers running with the land. Once created, the Virginia statutes are clear that

proffers follow the property. Several Virginia statutes authorize localities to accept proffers or conditions in conjunction with rezonings. *See* Va. Code Ann. §§ 15.1-491(a), 15.1-491.2 and 15.1-491.2:1, App. *infra*, 95a.[7] The legislative provisions, which govern conditional zoning in Prince William County, are contained in § 15.1-491(a).[8] App. *infra*, 95a .

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[7] Unless otherwise noted, all statutory references are to the Virginia Code Annotated.

[8] § 15.1-491(a) sets forth those localities which may utilize its enabling authority with respect to proffered rezonings. Prince William County is included by reference in the statute because it is a county with the county executive form of government contiguous to Fairfax County which is a county with the urban county executive form of government. This is colloquially known as "old" conditional zoning, because it was the first enabling authority enacted. It is the most liberal of the provisions relating to conditional zoning in the Virginia Code.

§ 15.1-491(a) gives the County the power and authority to adopt reasonable conditions as part of an amendment to the zoning map, in addition to the regulations provided for in the zoning district by ordinance. The pertinent parts of this critical section are set out below:

> ... for the adoption, in counties..., wherein the urban county executive form of government is in effect, or in a...county contiguous to any such county...as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for in the zoning district by the ordinance, when such conditions shall have been proffered in writing, ... by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property

> covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

App. *infra*, 95a-97a.[9] The flexibility in zoning, provided by the concept of conditional zoning in Virginia, supports the conclusion that property interests in the proffers inure to the local government from the zoning.[10] This statutory provision makes proffers like other property interests that also run with the land. Like materialman liens,

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[9] § 32-700.30 of the Prince William County Code is the local implementing ordinance. App. *infra*, 111a.

[10] In 1990, the Virginia General Assembly recognized the substantial property interests or investments by landowners in proffered rezonings and accorded greater protection to them from future changes in zoning by the governing body even when no rights had otherwise vested under Virginia common law. *See* Va. Code Ann. §§ 15.1-491 (a1), (a2), & (a3) App. *infra*, 95-107a.

for example, proffers attach to the underlying property, and are, by that attachment, in the nature of property interests. A rezoning secures the proffers, which become and remain part of the land. If the Court of Appeals is to "draw lines," it must do so according to relevant concerns such as whether an interest becomes an integral part of a piece of property, not *non-sequitors* such as how a particular property interest was created.

With its rezoning in 1986, the William Center Tract became subject to the proffered conditions attendant to that rezoning of the property. There is no debate that these proffers were extant at the time of the Congressional taking in 1988. The proffers were,

therefore, a part of the property for which the County should have been compensated.

2. If Unreviewed, the Court of Appeals' Decision Will Result in Different Treatment of Public Property Owners Under the Fifth Amendment.

The Court of Appeals properly framed the issue as "whether the County's right to enforce the provisions of the proffers partake of the nature of those interests called 'property' for which compensation is due." 48 F.3d at 524, App. *infra*, 18a-19a. The Court of Appeals erred, however, in focusing on the reason or purpose that the County acquired its property interests. Citing an old economics journal and the need "to draw lines" between property interests and other interests, it

determined, without *any* case or statutory authority, that proffers were not property interests. If the Court of Appeals ruling were allowed to stand unreviewed by this Court, lower courts will decide a public entity's entitlement to compensation on the basis of the peculiar nature *of the property owner* rather than the characteristics of the interests held by it. This is contrary to the fundamental constitutional principle that the status of a property owner should not decide its right to compensation. If unreviewed, the Court of Appeals' decision will provide foundation for a new line of cases that hold that the purpose or object of the property owner in acquiring property is relevant, or

even determinative, as to whether he, she or it owns a property interest.

The purpose or object for which something is acquired does not change the nature of the thing. Yet, both the Court of Appeals and the Trial Court disagreed with the County's contention that the properly accepted proffers conferred on the citizenry of Prince William County certain rights and benefits which constitute property. Neither of the lower courts questioned the rezoning itself or the process by which the County rezoned the Tract. Indeed, the Court of Appeals recognized that Prince William County was authorized to accept proffers. 48 F.3d at 524, App. *infra*, 14a-15a. The lower courts also did not question the

reasonableness of the proffered conditions. Instead, they focused on what they found to be the purpose of the proffers. The Trial Court determined that acceptance of the proffers by the County resulted in legislative amendments which could not constitute property interests. 23 Cl. Ct. at 209, App. *infra*, 63a.[11] Similarly, the Court of Appeals found that the proffers could not be property interests because their "purpose" or "object" was "to commit the developer to undertake his project with

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[11] This finding and resultant conclusion is particularly disturbing since the United States acquired all "right, title and interest" in and to the subject property by a legislative act. Applying the lower court's logic to the Act, for instance, the argument would be that the United States acquired no property interests in the Hazel property because it acquired the Land for the purpose of saving the Manassas National Battlefield through its legislative authority, and it could not bargain that legislative authority away. The United States would reject such an argument as absurd.

a specified degree of concern for and responsibility toward the surrounds and the people who in future years would live and work there." 48 F.3d at 525, App. *infra*, 21a-22a.

By their very nature, local governments are concerned with the well-being of their citizens. Unlike private property owners, value is conferred upon a county when benefits are conferred on its citizens. In addition, the legislative process, by which conditions are imposed, should not militate against regarding the *product* of that process as an interest in property. Counties can act only through legislative processes. In focusing on the "purpose" or "object" of the proffers from the perspective of a private property owner, the Court of

Appeals decided compensabitity of proffers based on the inherent characteristics of governmental entities rather than the value of the interest gained *from the perspective of a government*. The consequence is fodder for future denials of compensation to all public landowners. The Court should grant the writ to protect public landowners from such an unfair result.

3. If Unreviewed, the Court of Appeals' Decision Can Serve to Deprive Public Landowners of the Benefits of their Legislative Acts.

In this case the County acquired a property interest by a legislative act. The settlements, which the United States reached with the other entities owning property interests in the Tract, indicate that substantial consideration was given to the rezoning of the

property, and that the successors to Hazel realized a significant monetary benefit from the rezoning. *See* 48 F. 3d at 523, App. *infra*, 9a. In 1990, the United States settled with NV Homes, *et al.* for a portion of the property in the amount of $34.1 million, plus interest, almost *five* times the price paid by the condemnees in 1986. (Federal Claims Court Docket Entry, Dec. 3, 1990, Exhibit K). In 1990, the United States also reached a settlement, approved by the Claims Court, with Perch, *et al.* for $67,630,000, plus interest, again, at a value *seven* times the $9.8 million purchase price Hazel paid before the Tract's rezoning. *App. infra*, 127a.

Conversely, but for the rezoning by the County, the appraisal of the subject

property would be based on much less valuable uses ("A-1" Agricultural) and the private landowners would have been awarded substantially less. This, alone, presents a compelling reason for holding the United States liable to the County for the value of the proffers attendant to that rezoning.

The events surrounding the specific proffer of five (5) acres of land for a public facility site are illustrative of how the County has been deprived of the benefit of its legislative act of rezoning the Tract. Through its legislative processes, the County gained the 5-acre site dedication. Hazel's successor was paid the increased value of this tangible property interest by the U.S. government even though Hazel

had committed, through the rezoning process, to dedicate it to County uses.[12] Hazel's compensation from the United States included the value of the 5-acre site. Yet the United States refused to pay the County anything for it.[13]

4. If Unreviewed, the Court of Appeals' Decision Will Serve to Deny Compensation to Public Entities Because They Do Not Hold Title at the Time of the Take

a. Owners of Liens and Restrictive Covenants Would Be Denied Just Compensation

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[12] The United States assured the Trial Court, when the Trial Court considered the order approving the settlement orders with the private property owners, that it would not later argue that to compensate the County's property interest in the 5-acre tract or other interests claimed would be double payment. Based on that representation, the Trial Court entered settlement orders before hearing the County's claim.

[13] That the County did not have present physical possession of the five (5) acres at the time of the take is beside the point. As set forth below, there are many sorts of property interests that entitle their owners to future, not present, possession.

The rationale of the Court of Appeals can be used to deny compensation to both public and private possessors of less than complete property rights with present rights of possession. The Court of Appeals determined that the proffers did not create property interests, in part, because

> …no title to any of these amenities and facilities passed to the County. There is nothing in the document of proffers that suggests these were to be County property or that they were to be available to the County for its purposes apart from the need to meet the additional concerns caused by the developer's proposal itself.

525 F.3d at 525, App. *infra*, 22a.

More particularly, as stated at footnote 6, herein, the Court of Appeals noted that the proffer for five (5)

acres, to be set aside for a fire station and other uses, might be property if title to the site was transferred to the County prior to the taking. *Id.* at 525 & n.11. The Court's rationale in requiring the actual transfer of title *prior to the take* is a dangerous precedent for property owners. Courts can be expected to seize upon this test to deny compensation to both public and private owners of future interests in property. The test will also be used to deny compensation to lienholders and those who enjoy the protection of restrictive covenants.

As argued above, § 15.1-491(a) creates a property interest that runs with the property to which it attaches. The interest created is analogous to

other interests that are clearly property. They are sufficiently analogous to materialman liens for their possessor to be entitled to compensation for their taking. In *Armstrong v. United States*, 364 U.S. 40 (1960), this Court upheld the right of materialmen to collect the value of liens on vessels taken by the Federal government even though the liens had not been recorded before the taking. Significantly, the lower court noted that the liens attached by operation of law. Proffers, like materialman liens, attach directly to the underlying property and should, therefore, be the subject of compensation.

Proffers also sometimes confer upon their holders the benefit of restricting

activities on the property. This benefit is indistinguishable, in terms of *interest*, from the benefit conferred upon the benefactors of restrictive covenants. The proffers that all-weather trails and certain recreational facilities be provided in certain locations equate to covenants that those areas not be used in any other fashion. Possession of the ability to restrict the use of another's property is a valuable right, even though title to the property so restricted might never be transferred.

The similarity between proffers on the one hand and materialman liens and restrictive covenants on the other dictates that the Court of Appeals should have placed proffers on the same

side of the "line" as materialman liens and restrictive covenants.

b. Owners of Future Interests Would be Denied Compensation

The Court of Appeals was simply wrong when it observed that: (1) no title had been transferred and (2) nothing else in the proffer document indicated that the proffers were to be County property. *See* 48 F.3d at 525, App. *infra*, 22a. Proffer Number 14, for example, absolutely required the developer to convey $2 million on the occurrence of certain events. *See* App. *infra*, 122a. In this respect, the County's interest is analogous to a future interest in that substantial figure. The County would have received the money if the contingent events had not been made impossible by the

Congressional taking. Proffer Number 9 clearly states that title to 4.5 acres of right-of-way would be County property. The developer committed to dedicate the property any time prior to final subdivision approval that the County requested it. *See* App. *infra*, 118a. Perhaps the Court of Appeals balked from finding the County had a future interest because of the term "dedicate" instead of "convey." *See id.* If so, it is ironic that, in the same opinion, the Court of Appeals found certain street rights-of-way, dedicated according to the usual statutory procedure, to have been conveyed in fee simple absolute as provided by Virginia Code § 15.1-478. *See* App. *infra*, 108a. The effect of the statutory dedication

procedure in Virginia is to convey interests in fee simple. 48 F.3d at 527, App. *infra*, 35a-36a. Therefore, the Court of Appeals erred in not also recognizing that the effect of Proffer 9 was that the 4.5 acres of dedicated right-of-way was to be County property.

Aside from the consequences of statutory dedication, the Court of Appeals' decision ignores that Hazel's offer, and Petitioner's subsequent acceptance of the proffers in conjunction with the rezoning, constituted a valid common law dedication which created a property interest in the Petitioner. In this case, the dedication was complete upon the rezoning and acceptance of the proffers. In Virginia common law,

dedication may be accomplished by any means through which intent to dedicate is made manifest. *May v. Dewey*, 201 Va. 621, 112 S.E.2d 838 (1960). In this case, the offer to dedicate and subsequent acceptance of the proffers by the County in granting the rezoning clearly represented the unequivocal acts necessary to effect a valid dedication. There was no remaining substantive requirement necessary to effect a valid dedication under Virginia law except to transfer possession. That transfer of possession had not occurred at the time of the taking does not abrogate the fact that a valid dedication took place at the time of the rezoning.

Furthermore, the dedication made became irrevocable. In Virginia,

dedications are irrevocable once made. *See Greenco Corp. v. City of Virginia Beach*, 214 Va. 201, 198 S.E.2d 496 (1973). A dedication is not voided just because one of the parties has the power to change the circumstances of that dedication at some future time. *Id.* Therefore, the dedication that was accomplished is not rendered meaningless because the County could later rezone the property.

In this particular case, moreover, the work, which had been performed on the Tract, rendered the County unable unilaterally to rezone it at the time of the taking. As argued before the Court of Appeals, the County took no action to modify the rezoning between the date of the rezoning in 1986 and the 1988 taking

by Congress. More important, the level of development of the Tract, completed at the time of the taking, was such that the developer had a right to proceed to completion, and was not subject to zoning changes the County might have enacted later. Under Virginia law, this is called having a "vested right" in the ability to proceed with the approved plans notwithstanding subsequent changes in government regulation. Two specific Virginia Supreme Court cases deal with vested rights and support the conclusion that Hazel and its successors had a vested right to continue with its project rendering the County unable to unilaterally rezone the Tract. *See Board of Supervisors of Fairfax County v. Medical Structures*, 213 Va. 355, 192

S.E.2d 799 (1972); *Board of Supervisors of Fairfax County v. Cities Service Oil Co.*, 213 Va. 359, 193 S.E.2d 1 (1972). If, as the above cases dictate, the owners' interest in the zoning of the tract vested, the Petitioner's ability to enforce the proffers given to it also matured at the same time. The Petitioner's vested interest constitutes a property interest for which it is entitled to just compensation. The Court of Appeals erred in holding to the contrary.

In sum, the Court should grant this petition to provide guidance on a subject that is likely to reoccur anytime the Federal Government takes property that is encumbered with proffers. It should advise lower courts

whether its ruling in *United States v. 50 Acres of Land, supra,* applies to prevent different treatment of public entities (from that accorded to private landowners who receive substantial compensation) because of the peculiar manner in which public entities acquire and use property. The Court should stem the development of a body of Federal law that that can serve to deprive all local and state governments of compensation when they acquire property through legislative acts or are constrained, by the nature of those legislative acts, from trading those interests in the marketplace. Finally, it should grant this petition to provide guidance on whether a local government's right to compensation should be decided with

respect to state law or what the Court of Appeals referred to as "increased internalization."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

SHARON E. PANDAK
County Attorney
Counsel of Record

GIFFORD R. HAMPSHIRE
Assistant County Attorney
1 County Complex Court
Prince William, Va. 22192
(703) 792-6620
Counsel for Petitioner

May, 1995

IN THE SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1994

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

Petitioner,
v.
UNITED STATES, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF SERVICE

I, Gifford R. Hampshire, a member of the Bar of this court, hereby certify that on this 22nd day of May, 1995, three copies of the Petition for Writ of Certiorari in the above-entitled case were mailed, first class, postage prepaid, to:

1. Jacques B. Gelin, Appellate Section, Environment and Natural Resources Division, P.O. Box 23795, L'Enfant Plaza Station, Washington, D.C. 20026 (202) 514-2762 Counsel of Record for Respondent,

2. The Solicitor General, Department of Justice, Washington, D.C. 20530 (202) 514-2000

3. Allan Brenner, Esq. U.S. Department of Justice, General Litigation Section, Environment & Natural Resources Division, U.S. Department of Justice, 601 Pennsylvania Avenue, N.W., Room 847 Washington, D.C. 20004-0663 (202) 272-6280. Counsel for U.S. Department of Justice and, by courtesy, as Counsel for Respondent below.

I further certify that all parties required to be served have been served.

G. R. Hampshire

GIFFORD R. HAMPSHIRE,
Assistant County Attorney
1 County Complex Court
Prince William, VA 22192
(703) 792-6620
Counsel for Petitioner

FILED
No. 941921 MAY 22 1995
OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1994

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Sharon E. Pandak*
County Attorney
Gifford R. Hampshire
Assistant County Attorney
1 County Complex Court
Prince William, VA 22192
(703) 792-6620

Counsel for Petitioner
****Counsel of Record***

LAWYERS PRINTING COMPANY 7th & Franklin Bldg Richmond,Virginia 23219 (804) 648-3664

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5099

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

JUDGMENT

ON APPEAL from the UNITED STATES COURT OF FEDERAL CLAIMS IN CASE NO(S). 90-364L

This CAUSE having been heard and considered it is

ORDERED and ADJUDGED: AFFIRMED-IN-PART, REVERSED-IN-PART, and REMANDED

ENTERED BY ORDER
OF THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

DATED Feb 21 1995

ISSUED AS A MANDATE: April 14, 1995

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-5099

BOARD OF COUNTY SUPERVISORS OF
PRINCE WILLIAM COUNTY, VIRGINIA,

Plaintiff-Appellant,

v.

THE UNITED STATES,

Defendant-Appellee.

DECIDED: February 21, 1995

Before PLAGER, Circuit Judge, COWEN, Senior Circuit Judge, and SCHALL, Circuit Judge.

PLAGER, Circuit Judge.

This is a takings case, involving the question of what is a compensable property interest within the meaning of

the Fifth Amendment to the Constitution.[1] The United States by legislative mandate took some 550 acres of land in Prince William County, for which just compensation was due. The Board of County Supervisors of Prince William County, Virginia, (the "County Board" or "Board," sometimes "the County") sued for its share of the compensation awards, based on what it claimed were property interests owned by the County. The Court of Federal Claims concluded that, whatever interests the County may have had in the land, they were not such as to entitle it to compensation for the

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[1] The takings clause of the Fifth Amendment states: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl.5.

taking.[2] The Board appeals that judgment to this court. We affirm-in-part, reverse-in-part, and remand with instructions for further proceedings.

BACKGROUND

In November 1988 Congress resolved a feud between a citizens coalition and a real estate developer regarding the future of some 550 acres of land, known as the William Center tract,[3] adjacent to the Manassas Battlefield Park, a historic

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[2] *Board of County Supervisors v. United States*, 27 Fed. Cl. 339 (1992); *Board of County Supervisors v. United States*, 23 Cl. Ct. 205 (1991).

[3] The County in its brief refers to the 550 acres as the Manassas tract, "including" the Williams Center tract. Both the United States and the trial court refer to the 550 acre tract as being the Williams Center tract. For purposes of this opinion, we will treat the 550 acres as coterminous with the William Center tract.

Civil War site in Virginia. The owner of the tract, hereinafter "the developer," was in the process of constructing a large development on the land.[4] The development was planned to include up to 650 residential units and an initially authorized 2,910,000 square feet of nonresidential space. Two years earlier, pursuant to the County's statutory zoning and planning authority, the development had been approved and the necessary rezoning enacted by the County Board.

As part of the approval and rezoning process the developer gave to the Board a document entitled "Proffer," subsequently approved by the County's Office of

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[4] The owner of the tract was actually a number of legal entities engaged in its development. For convenience we shall call them, collectively, the developer.

Planning as the "Proffer/Development Plan." This document described the details of the proposed development, and set out a series of steps that the developer agreed to take as part of the development. These included: providing open space and buffers, particularly along adjacent roads, and preserving tree coverage; working with the National Park Service and nearby affected residents in evaluating appropriate screening measures; creating a property owners association; providing stormwater drains; providing a community trail system with natural or all-weather surface; providing a community swimming pool/center, two tennis courts and two multi-purpose courts, and a ballfield, all "in fulfillment of County recreation requirements;" and undertaking various

on- and off-site roadway improvements, or compensating the county for their construction. There was also a commitment to contribute a sum of money to the County for public school purposes, and to provide five acres for a fire station and a commuter parking lot or other public facility.

In addition to executing the "Proffer" document, the developer, as part of the rezoning approval process, conveyed to the County five parcels of land, aggregating 16.05 acres. The County needed these parcels for street improvements and related activities necessitated by the development.

The citizens coalition, having failed to convince the County Board of the undesirability of permitting such development adjacent to the national

park, took its case to Congress. Congress agreed with the citizens group, and enacted the Manassas National Battlefield Park Amendments of 1988 (the "Act"), Title X of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3810 (1988), codified at 16 U.S.C. § 429b(b) (1988). That Act vested in the United States, as an addition to the Manassas Battlefield National Park, all right, title, and interest in and to, and the right to immediate possession of, the 550 acre William Center tract. The Act further obligated the United States to "pay just compensation to the owners of any property taken pursuant to this [Act] and the full faith and credit of the United States is hereby pledged to the payment of any judgment entered against

the United States with respect to the taking of such property." 16 U.S.C. §429b(b) (2) (B).

Separate suits were filed by the developer and the County in the Court of Federal Claims seeking the compensation claimed to be due them. The United States paid the developer a substantial sum of money for the land and the construction that had already occurred. However, the United States declined to pay the County anything for either the value of its 16.05 acres or for the value of the proffers.

During the course of the litigation with the County, the United States moved for dismissal of that part of the suit involving the proffers. The court granted the motion, holding that the proffers accepted by the County were not

"property" for purposes of the takings clause of the Fifth Amendment. ***Board of County Supervisors v. United States***, 23 Cl. Ct. 205 (1991). Subsequently, the court ruled that the County was not entitled to compensation for the 16.05 acres which the developer had previously transferred to the County. ***Board of County Supervisors v. United States***, 27 Fed. Cl. 339 (1992). The County Board appeals both rulings to this court.

DISCUSSION

As did the trial court, we will consider the case as involving two separate claims, one for the value of the "proffers," and the other for the value of the 16.05 acres, title to which was in the County. At the outset, we point out that there is no question about the liability of the United States for the

property it took under the 1988 Act; as noted earlier, the Act (not to mention the Fifth Amendment) obligated the United States to pay for any property interests taken by the United States as a consequence of the legislative declaration. The question for us is whether, among the compensable property interests taken by the United States, were there any owned by the County?

I.

Efforts by local governments to control land development blossomed in the 1920's when the idea of land use zoning, blessed by the federal government,[5] spread rapidly across the country. Not long after, regulation of large scale

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[5] *See Standard State Zoning Enabling Act*, a 1922 publication of the Department of Commerce.

residential (and later, nonresidential) developments through planning and subdivision control ordinances followed. However euphemistically described, it has now become common practice for local government units with zoning and planning authority to exact from developers various concessions as a condition to granting the necessary zoning changes and planning code approvals for proposed developments. These exactions range from requiring the developer initially to install at the developer's own cost the roads and sewers needed to serve the development, to dedicating land for public recreation facilities and other public needs, to making cash payments to local schools as recompense for the additional students generated by the development.

When first this practice surfaced, it was attacked on several grounds. It was argued that, since the local unit negotiates individual terms with each developer, this practice amounted to zoning by contract which was unconstitutional because government may not contract away the police power. *See generally*, Robert R. Wright and Morton Gitelman, ***Land Use*** 801-12 (4th ed. 1991). *Accord*, ***Mumpower v. Housing Authority of Bristol***, 176 Va. 426, 452-55, 11 S.E.2d 732, 742-44 (1940). Another ground for objection was that, in the absence of specific enabling legislation, it is ***ultra vires*** for local government to impose conditions on land use that are not part of the standard provisions contained in the local government's zoning and planning ordinances. *See,*

e.g., Hylton v. Prince William County, 220 Va. 435, 258 S.E.2d 577 (1979); cf. *Board of County Supervisors of Prince William County v. Sie-Gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) (developer may obligate itself to perform conditions which local authority was not empowered to require).

Over time, state legislatures addressed the question of whether local governments could impose these development exactions. In Virginia, a statute now authorizes certain counties (of which Prince William is one) to impose, in addition to the requirements provided for the zoning district by the ordinance, "reasonable conditions" for a grant of rezoning based on a landowner's proffers made in conjunction with a request for rezoning. Va. Code Ann.

§ 15.1-491(a) (Michie 1994). "Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions." *Id.*

In this case, the validity of the development exactions is not before us, but the nature of such exactions is. The County argued that the accepted proffers gave the County contract rights against the developer, and that contract rights are "property" under the Fifth Amendment. The County is correct that contract rights are property, but the trial court was correct in rejecting the County's argument here. The fact that, in some cases, the process by which proffers become incorporated into the zoning

system may involve a degree of negotiation does not convert an exercise of the police power into an exercise in contract.[6] It is basic law that when local governments engage in land use planning and control, they do so by exercising the sovereign's police power delegated to them by the state, typically through general enabling legislation.[7]

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[6] The focus of this opinion is on the interests acquired by the County. We do not address the question of the nature of the interests acquired by the developer, which is a separate matter.

[7] "A general State enabling act is always advisable, and while the power to zone may, in some States, be derived from . . . home rule, still it is seldom that the home-rule powers will cover all the necessary provisions for successful zoning." ***Standard State Zoning Enabling Act***, explanatory note 1 (1922). All states today have adopted enabling acts that delegate zoning authority to local governments.

As noted, the Virginia legislature expressly authorized counties such as Prince William to engage in the process of conditional zoning; that is what the County did here in the exercise of its delegated police power to control land use through zoning. There is no need, or justification, to overlay this exercise with a contract veneer. The County was not engaged in the business of contracting when it dealt with this developer, and the United States did not take from it any rights based on contract.

The County further argues that, even if not based on contract but on operation of law, the County had valuable rights. Summarized, the argument runs like this: The proffers are in the nature of a security interest, not unlike that of a

materialman lien. The interests created in the County vested when the rezoning was granted, and constitute a valid dedication of the property. Since the County neither reversed the rezoning of the property nor abandoned its rights prior to the taking, the County, it is claimed, is entitled to compensation for these interests.

The County's argument is circular. The point is not that the County had the ability to legally enforce the zoning, just as a materialman may enforce a lien, or that the County's enforcement right was established when the rezoning took place, or that the County avoided doing anything to undercut its right prior to the taking. The point, the question, is whether the County's right to enforce the provisions of the proffer partake of the

nature of those interests called "property" for which compensation is due.

At the metaphysical level, the notion of property can be said to encompass virtually any relationship among persons[8] with regard to the "things" of the external world. And indeed, as every first year law student learns, property rights have been accorded with regard to a variety of things, ranging from intangibles such as corporate stock, poems, and the gathering of news, to wild animals, flowing water, pieces of outer-space waste, a lost brooch on a window sill, and dead bodies, and even to government benefits. *See, generally*, Jessie Dukeminier and James E.

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[8] This includes legal persons, of which a governmental unit like the County is one.

Krier, ***Property*** 1-190 (3d ed. 1993); John E. Cribbet, Corwin W. Johnson, Roger W. Findley, Ernest E. Smith, ***Property*** 1-165, esp. c. 1 "What is Property" (6th ed. 1990); Sheldon F. Kurtz and Herbert Hovenkamp, ***American Property Law*** 1-44 (2d ed. 1993). ***See also, Goldberg v. Kelly***, 397 U.S. 254 (1970); ***Lynch v. United States***, 292 U.S. 571 (1934).

But rights in property are created by law, and the law has found it necessary to draw lines. Sometimes the lines drawn are pragmatic, sometimes policy based, and sometimes simply a function of judgment about what is or should be.[9] The object of the proffers

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[9] ***See, e.g.,*** Bruce Ackerman, ***Private Property and the Constitution*** (1977), criticizing as "Scientific Policymaking" the efforts of various scholars to assess legal rules in terms of abstract general principles, and (continued...)

in this case was not to give the County something of intrinsic value with which it could go into the market place and trade, or which it could use and possess for county purposes.[10] The purpose of the proffers was to commit the developer to undertake his project with a specified degree of concern for and responsibility toward the surrounds and the people who in future years would live and work

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[9](...continued)
offering instead the views of the "Ordinary Observer"; A. Demsetz, ***Toward a Theory of Property Rights***, 57 Am. Econ. Rev. 347 (Pap. & Proc. 1967), arguing that property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.

[10] ***See*** Demsetz, ***supra*** n.7 at 348: "Increased internalization, in the main, results from changes in economic values, changes which stem from the development of new technology and the opening of new markets, changes to which old property rights are poorly attuned."

there. Buffer zones, preservation of trees, even tennis courts and ball parks, were not assets for the general benefit of the county, but were amenities and facilities that the developer agreed to include both for his own economic interest and for that of the citizens who would be directly affected by the development.

Further, no title to any of these amenities and facilities passed to the County. There is nothing in the document of proffers that suggests these were to be County property, or that they were to be available to the County for its purposes apart from the need to meet the

additional concerns caused by the developer's proposal itself.[11]

The County's reliance on doctrines relating to negative easements and the enforceability of subdivision restrictions between the private landowners is misplaced. And the esoterica regarding whether certain kinds of privately-held equitable servitudes run with the land or not is beside the point. The point is that the proffers, when incorporated as Virginia law

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[11] A possible exception appears in paragraph 20 of the "Proffer," entitled "Public Land Dedication." This paragraph deals with five acres to be set aside for a fire station and other uses. From the record it does not appear that, if this parcel was intended to be transferred to the County, such transfer occurred prior to the taking. If it did, it would raise the same issues as those dealt with in part 2 of this opinion, regarding the 16.05 acres. On remand the trial court, if asked, can sort this out.

provides into the ordinance granting the rezoning, gave the County the power to enforce the ordinance as enacted. That power the County could not sell, give away, or transfer. Such enforcement rights arise out of and are defined by the County's exercise of the police power.

In *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), the Supreme Court reversed a state's judgment of noncompensability under the Fifth Amendment when the city exacted from the property owner, as a condition to the grant of a requested rezoning, the dedication to it of a portion of her property lying within the 100-year floodplain of adjacent Fanno Creek. The city not only wanted the property owner not to build in the floodplain, but it

also wanted the property owner's land along Fanno Creek for its greenway system. As the Court noted, "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control." *Id.* at 2320.

The County in this case avoided making that particular mistake. It did not require through the "Proffer" document that the developer transfer to the County title to or any ownership interest in the land affected by the proffers. The County did not "own" any interests by virtue of the proffers, and the enforcement rights the County derived from the proffers were not themselves in

the nature of property.[12] The trial court was correct in dismissing the County's claim regarding the proffers.

II.

The County's claim for compensation arising from the taking of the 16.05 acres raises different issues. The record is clear, and the trial court expressly held, that the five parcels that constitute the 16.05 acres were conveyed, prior to the government taking, to the County by the developer through deeds and plat dedications that had the legal effect of giving the County title to all five in fee simple. The United States argues, however, that the purpose

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[12] We express no view whether, had the developer not volunteered the proffers, their imposition by the County would have constituted a taking of the developer's property.

of these transfers was so that the County could engage in certain road improvements necessitated by the development. From this, the United States argues, and the trial court agreed, there was established a legally enforceable burden on the properties transferred. Since the land burdened with this limitation had no practical market value, it was impossible to ascertain what just compensation would be and thus the United States, it is argued, was not obligated to pay compensation for its taking.

The argument is innovative, and the United States cites cases for support of the proposition that a taking of interests for which there is no ascertainable value cannot be compensated. The argument, however, is based on an erroneous premise. It has

long been the law of this country that restraints on alienation of property are disfavored. *See, e.g.*, Richard R. Powell and Patrick J. Rohan, 5B ***Powell on Real Property*** §§ 839-40 (1994): "In general, it can be safely asserted that under present law, there is no way in which an unqualified restraint on alienation [i.e., one not limited by time, manner, or alienee] can be effectively imposed on a legal estate in fee simple." *Id.* at 77-79. See also VI ***American Law of Property*** §§ 26.1-26.47 (1952); *accord* ***Dart Drug Corp. v. Nicholakos***, 221 Va. 989, 277 S.E.2d 155 (1981). The rule limiting restraints on alienation has particular application to the estate fee simple, an estate considered by the common law as an estate of general inheritance and of potentially infinite

duration. Cornelius J. Moynihan, *Introduction to the Law of Real Property* 34 (1962).

The common law does make limited provision for placing conditions upon a fee simple estate in land when such conditions are made an express part of the estate. This assumes strict compliance with the requirements for creating a 'qualified' or 'defeasible' fee simple estate. Three such 'qualified' estates, in which the instrument of transfer leaves the transferee with less than a fee simple absolute, are recognized at common law.[13]

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[13] The estate in fee tail, now generally modified or prohibited by statute, was a qualified fee estate, but not a fee simple and not technically subject to defeasance.

The first type is a fee simple subject to a special limitation, usually called a fee simple determinable. When the language of a conveyance creates a fee simple determinable, there is left in the transferor a future interest (that is, a present interest in future possession) called a possibility (or right) of reverter. The other qualified fee simple estate, the creation of which involves a divesting interest in the transferor, is a fee simple subject to a condition subsequent. This occurs when, by the language of the conveyance, the fee simple estate is made subject to a power in the grantor to terminate the estate granted on the happening of a specified event. The interest remaining in the transferor is denominated a right of entry or power of termination.

The third type of qualified fee simple is the fee simple subject to any executory limitation. This is created when the fee simple is by its terms subject to divestment in favor of a person other than the conveyor upon the happening of a specified event. The other person has an executory interest; this type of defeasible fee simple was not possible prior to the Statute of Uses in 1536.[14] For detail, and some of the nuances, *see* Ralph E. Boyer, Herbert Hovenkamp, and Sheldon F. Kurtz, *The Law of Property* 82-89 (4th ed. 1991).

On the record before us, it does not appear that there was anything in the

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[14] Regrettably, this case does not require us to consider application of the *Rule in Shelly's Case*, 1 Co. Rep. 93b (1581), since the conveyances did not involve remainders limited to the heirs of the developers.

deeds or the dedications that expressly limited the conveyed interests to road improvements purposes, or purported to create any of the interests described above. It matters not that the parties contemplated that the property would be used for a particular purpose. If an owner of land conveys it in fee simple to a buyer who, it is understood, will build a traditional Cape Cod upon it, and instead the buyer builds a contemporary manse, can the transferor claim the title does not permit that choice? Absent an express condition in the deed, such as those we have described, or some enforceable restrictive covenant imposed

by deed or dedication, the choice is the new owner's.[15]

By like token, the developer here, absent an express condition in the instrument of transfer sufficient to create an enforceable right against the County, retained no power to reclaim the land should the County fail of its purpose. And absent such conditions on the County's estate in the land, the County took in fee simple, as the Virginia statute specifies,[16] and was

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[15] We offer no view about the potential of a suit for damages or recision for breach of contract. And of course the question of publicly-imposed restrictions, such as architectural restrictions, is a separate question.

[16] *See* Va. Code Ann. §15.1-478 (Michie 1994) (the recordation of a plat with deeds of dedication "shall operate to transfer, in fee simple, to the [County] such portion of the . . . plat set apart for streets . . . .").

free as a matter of property law to do with the property what it wished.[17]

When the trial court analyzed what the County had received in the transfers from the developer, the court concluded what the County owned were "the street rights of way in fee simple." *Board of County Supervisors*, 27 Fed. Cl. at 345. "Rights of way" are another term for easements, which are possessory rights in someone else's fee simple estate. In other words, a fee simple estate can be burdened by an easement which entitles someone other than the owner of the fee to use the property, for example as a

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[17] Again, we do not offer any views on whether the developer might have had a cause of action against the County for damages or for recision, based on breach of contract or some similar theory, should the project have proceeded and the County have failed to build the expected road improvements.

right of way across it. But a fee simple estate is not an easement, or vice versa.[18] It is not clear exactly what the trial court meant, then, by the term "rights of way in fee simple," since that could refer either to a fee simple estate or to an easement (right of way), but not both.

Our examination of the record and of the applicable Virginia law leads us to conclude that the trial court was correct in concluding the estate was one in fee simple -- what the County got was a fee simple estate, not an easement for street use. *See* Va. Code Ann. § 15.1-478

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[18] The right, by way of a granted easement, of someone to make use of another's land held in fee simple should not be confused with the question of imposing qualifications or restraints on the owner's rights of alienability of the fee title.

(Michie 1994); n.16 ***supra***. Because the trial court thought the fee simple estate was legally burdened by the avowed purpose of the transfers, the use of the phrase "street rights of way in fee simple" is understandable as a description of what the trial court thought was the legal effect of the conveyances.

The trial court elsewhere clearly differentiated between the property interests involved in the 16.05 acres and property interests regarding easements and rights-of-way. The court notes that the County in its original complaint sued for both the value of the 16.05 acres and for the value of road rights-of-way and easements also alleged to be taken. ***Board of County Supervisors***, 27 Fed. Cl. at 340 n.1. The court went on to note

that at the start of trial plaintiff withdrew its claims for just compensation for the taking of the easements. *Id.* What remained then was the 16.05 acres of land which, as the trial court held, were owned by the County in fee simple.

In light of our conclusion regarding the nature of the interests owned by the County, the argument of the United States regarding the difficulties inherent in determining the value of property interests for which there is no market is beside the point. That argument presupposes that the County's estates in the land were not fee simple estates, but were estates encumbered by street rights of way, and that such interests can have no reasonably ascertainable value. As we have said, that supposition is wrong. The interests held by the County in these

five parcels, constituting the 16.05 acres, are no different from the fee simple estates held by other owners of property within the William Center tract. We have considered the other arguments made by the United States, all of which build on the same supposition of burdened estates, and find them equally unpersuasive.

The judgment of the trial court, that the 16.05 acres of land taken from the County by the United States was without ascertainable value and therefore noncompensable, is reversed. The cause is remanded to the trial court for further proceedings to determine the just compensation due the County for the taking of its land which it held in unencumbered fee simple.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED

IN THE UNITED STATES CLAIMS COURT

No. 90-364L

(Filed: August 6, 1991)

* * * * * * * * * * * * * * * * * * * *

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * * * * * *

Sharon E. Pandak, Prince William County, Virginia for plaintiff.

Deputy Chief James E. Brookshire, Washington, D.C., with whom were **John S. Gregory**, **Alan Brenner** and **Donald Rosendorf** for defendant.

ORDER

TIDWELL, Judge.

On June 3, 1991, this court issued an Order partially dismissing plaintiff's complaint. On June 14, 1991, plaintiff

timely filed a Motion for Reconsideration under RUSCC 59. This rule states in relevant part" "[R]econsideration may be granted to all or any of the parties and on all or part of the issues for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." RUSCC 59(a)(1).

Common law and equity have established a number of reasons that would justify reconsideration, most of which are included in RUSCC 60. For instance, a motion for a new trial, rehearing, or reconsideration may be granted on the ground of newly discovered evidence. ***E.g., Marshall's U.S. Auto Supply v. Cashman***, 111 F.2d 140, 142 (10th Cir.), ***cert. denied***, 311 U.S. 667 (1940). However, for newly discovered

evidence to justify a new trial, rehearing, or reconsideration, the moving party must show: 1) that the newly discovered evidence was discovered since the disposition of the case; 2) facts from which the court may infer that the newly discovered evidence was not previously discovered due to a lack of reasonable diligence on the part of the movant; 3) that the newly discovered evidence is not merely cumulative or impeaching; 4) that the newly discovered evidence is material; and 5) that the newly discovered evidence is of such a character that on a new trial, rehearing or reconsideration, such evidence would produce a different result. *See, e.g., Id.* In the present action, plaintiff has filed to present such evidence.

Rule 60 provides further reasons to allow relief from judgment. It states that relief from judgment may be based on:

> (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

RUSCC 60(b).

Plaintiff's motion fails to satisfy any of these criteria for vacating the court's prior determinations. Much of

what plaintiff asserted in its motion for reconsideration merely is a reiteration of the arguments it made in its response to defendant's motion for summary judgment. As defendant correctly pointed out "[i]n large measure, Plaintiff's Motion for Reconsideration simply assumes its position that a legislative expectancy in "proffered" zoning conditions equates to a distinct property interest compensable under the Fifth Amendment." This court specifically rejected that conclusion. Where the motion does more than assume plaintiff's conclusion, it merely recasts arguments already briefed and decided to by the court after careful, thoughtful, and

detailed consideration.[1] To that extent, .

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[1] Plaintiff argued that the court "failed to address the increase in value of the subject [Prince] William Center tract because of the rezoning and proffers. This enhancement indicates that the proffers clearly have value." The court did consider this argument and included its findings in other sections of the Order. The court did not address this argument specifically because it is so totally devoid of merit. The heart of that argument, again, assumes the conclusion that proffers are property interests, which the court has determined they are not. Furthermore, plaintiff's argument is backwards because the increased value of the Prince William Center tract was due not to the proffers, but to the rezoning, and inured not to plaintiff, but to the developer. Plaintiff, apparently, would have this court view its status as that of a joint venturer, *i.e.*, it is entitled to "value based" compensation by virtue of its role as the legislative agent that enacted the conditional zoning. That argument assumes too much, and finds absolutely no support in any law of which the court is aware. As the court stated repeatedly in its June 3, 1991 Order, the zoning structure that includes proffers represents legislative authority; rezoning is a legislative act. The only expectancy underlying a legislative act is compliance with the law. The court amply explained why plaintiff cannot

(continued...)

the court declines plaintiff's invitation to re-examine the merits of earlier arguments.[2]

A motion under RUSCC 59 must be based upon manifest error of law, or mistake of fact, and is not intended to give an unhappy litigant an additional chance to sway the court. ***Scott Aviation v. United States***, 21 Cl. Ct. 782 (1990);

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[1](...continued)
enforce its zoning regulations against the federal government. Therefore, this argument must fail, as should have been apparent to plaintiff from the lengthy discussions in the Court's June 3, 1991 Order.

[2] The court also may grant a motion for new trial, rehearing, or reconsideration ***sua sponte***, regardless of whether a moving party has cited the reason upon which the court grants the motion. ***See generally Pate v. Seaboard R.r., Inc.***, 819 F.2d 1074, 1084 (11th Cir. 1987)1. However, in this case, the court is unable to find any reason, raised by plaintiff, or otherwise that would justify reconsideration.

Weaver-Bailey Contractors, Inc. v. United States, 20 Cl. Ct. 158 (1990). In light of RUSCC 59 and 60, relevant case law, and after fully reviewing this case file and considering the arguments raised by plaintiff's motion, the court is unable to find circumstances that would mandate allowing that motion. Accordingly, and for the reasons set out in detail in defendant's opposition to plaintiff's RUSCC 59 motion, plaintiff's Motion for Reconsideration is denied.

IT IS SO ORDERED.

/s/ Moody Tidwell
MOODY R. TIDWELL
Judge

IN THE UNITED STATES CLAIMS COURT
ORDER-PROFFER CLAIM

No. 90-364L

(Filed: June 3, 1991)

* * * * * * * * * * * * * * * *

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA,	Legislative Taking; Proffers Under Virginia Law; Zoning and Property Rights.

Plaintiff,

v.

THE UNITED STATES,

Defendant.

* * * * * * * * * * * * * * * *

Sharon E. Pandak, Prince William County, Virginia for plaintiff.

Deputy Chief James E. Brookshire, Washington, D.C., with whom were **John S. Gregory, Alan Brenner,** and **Donald Rosendorf** for defendant.

ORDER

TIDWELL, Judge.

This case is before the court on defendant's motion for partial dismissal

pursuant to RUSCC 12(b)(4), for failure to state a claim upon which relief can be granted. For the reasons set forth below, the court grants defendant's motion.

FACTS

In 1986, Hazel-Peterson Companies (Hazel) acquired approximately 542 acres of property near Manassas in Prince William County, Virginia (Prince William Tract), for approximately $9.8 million. This property adjoined the Manassas Battlefield Park and, at the time of the purchase, was zoned agriculture (A-1). The park, as is known by every student of American history, was the site of a major battle during the Civil War.

Following the acquisition of the Prince William Tract, Hazel applied to plaintiff, Board of County Supervisors of

Prince William County, Virginia requesting that plaintiff rezone the property from A-1 to a Planned Mixed Use District (PMD). PMD permits a mixture of residential and commercial uses within the rezoned property. Under state law, plaintiff is charged with legislative control of land use in Prince William County through zoning and other land use regulations. Through zoning ordinances, plaintiff establishes various zoning districts in the County which regulate the use to which property in each zoned district can be put. On November 18, 1986, plaintiff granted Hazel's request. *See Prince William County Rezoning #86-61*, ORD. No. 86-173, Nov. 18, 1986.

As a condition to rezoning, Hazel voluntarily and unilaterally made certain proffers - offers of conditions or

undertakings that the County deemed sufficiently mitigating of possible developmental impacts to warrant conditional rezoning - which would be included in the zoning ordinance in addition to the general conditions of the PMD. Under Virginia law, plaintiff is authorized to accept voluntary proffers as part of an amendment to the zoning ordinance. Va. Code Ann. § 15.1-491(a) (1982). In fact, there is a school of thought that believes that the "proffer system" has developed informally in county land use regulation and politics to a point where no substantive amendments to county zoning can be achieved in the absence of acceptable proffers. There is no question but that Hazel's proffers were significant, as it agreed to provide the following:

- natural and all weather trails;
- a community swimming pool center;
- two tennis courts;
- two multi-purpose courts;
- a multi-purpose ball field;
- design and installation of sewer and water facilities to serve subject property and Little Bull Run Watershed to the north;
- a $2 million contribution for a proposed Route 234 Bypass with Interstate 66 at the southwestern edge of the property;
- the widening of various roads planned to connect with the development to be dedicated to the county; and
- five acres of property for a fire station and a commuter parking lot.

In addition to the proffers, Hazel dedicated to plaintiff approximately 13 acres of land in fee and certain easements.[1] Plaintiff rezoned the property on November 18, 1986.

Hazel's original plan called for development of residential areas, an office park, and a strip shopping center of approximately 120,000 sq. ft. However, less than a year after the rezoning, Hazel announced plans to build a regional mall of approximately 1.2 million sq. ft. This, in turn, led to the formation of a grassroots "Save the Battlefield" coalition which opposed any further development around the Manassas Battlefield site based on the concern

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[1] These easements and dedications are not part of defendant's motion for partial dismissal.

that a large mall development would destroy the solemn character of the site.

On November 10, 1988, the United States Congress, in response to the coalition movement, enacted the Manassas National Battlefield Park Amendments of 1988 (Act). *See* Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, 102 Stat. 3342, 3810 (codified as the Manassas National Battlefield Park Act, 16 U.S.C. §429(b) (1991)). The Act vested in the United States all right, title, interest, and immediate possession of certain land, effecting a legislative taking by eminent domain of property which included the Prince William Tract. The Act provided for payment of just compensation to the owners of any property interest taken, as mandated by the fifth amendment.

Between the November 18, 1986 rezoning, and the November 10, 1988 taking, Hazel performed some development on the commercial and residential projects. As of the date of the taking, construction was limited to various incomplete sewer and water improvements, partially completed housing lots, and partially completed roadways. In total, Hazel expended approximately $8.5 million on infrastructure development. Plaintiff claimed that the proffers constituted "property" under the takings provision of the fifth amendment to the Constitution and, as a result of the taking, it lost the benefit of Hazel's proffers, entitling it to just compensation.

DISCUSSION

Plaintiff claimed that proffers accepted under a Virginia zoning

ordinance constitute private property for which defendant must pay compensation. The court believes this to be a case of first impression.

A. Proffers Are Not a Property Interest.

The Act expressly provided that the government would pay "just compensation" for any "property" taken. Under the literal terms of the Act, in order for plaintiff to be entitled to just compensation, it must show it had a property interest which the government took. However, not every destruction or injury to property by governmental action is a taking in the constitutional sense. ***Omnia Commercial Co. v. United States***, 261 U.S. 502, 508-510 (1923). Therefore, the court must determine what, if any, compensable property right plaintiff

possessed, and whether the government "took" that property.

"Property," as employed in the fifth amendment takings clause, includes every interest any individual may have in any and everything which is the subject of ownership, together with the right to possess, use, enjoy, and dispose of the same. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). The reference to private property in the takings clause encompasses condemned property of state and local governments because the loss of a public facility may be "no less acute than the loss in a taking of private property." *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984). The court ultimately must determine what constitutes property by reference to state law. *United States ex*

rel. T.V.A. v. Powelson, 319 U.S. 266, 279 (1943); *United States v. Causby*, 328 U.S. 256, 266 (1946); *see also Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 160 (1980). Virginia has construed broadly those interests which may be compensable. "In contemporary jurisprudence, 'property' refers to both the actual physical object and the various incorporeal ownership rights in the *res*, such as the rights to possess, to enjoy the income from, to alienate, or to recover ownership from one who has improperly obtained title to the *res*." *First Charter Land Corp. v. Fitzgerald*, 643 F.2d 1011, 1014-15 (4th Cir. 1981).

Plaintiff claimed that because it had a "legitimate claim of entitlement to benefits deriving under Virginia law in

the proffers," those benefits constituted private property. However, in order to find that plaintiff is entitled to compensation for the proffers, plaintiff must prove, and the court must accept, plaintiff's contention that it received a property interest in the proffers that inured to it at the time of the rezoning. Plaintiff failed to provide a basis grounded in property law to support this claim.

Pursuant to Virginia law, plaintiff accepted the proffers as part of district rezoning. Va. Code Ann. § 15.1-491(a) (1982). This section sets forth those counties that can utilize enabling authority with respect to proffered rezoning. The statute provides that, as a part of an amendment to the zoning map, a county may adopt:

> reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by § 15.1-493 by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions[.]

Id. Conditional zoning provides zoning authorities with added flexibility. In situations where rezoning otherwise would effect unacceptably drastic change, conditional rezoning mitigates the impacts to an acceptable level by adding certain use limitations, or conditions, *i.e.*, proffers.

The court does not agree with plaintiff that these proffers, once

accepted, "conferred on Prince William County and its citizenry certain rights and benefits which constitute private property." The court, in interpreting a zoning ordinance, "is controlled by the principal that words in common use must be given their plain and natural meaning in the absence of any showing that such words were used in any other than their usual and ordinary sense." ***McClung v. County of Henrico County***, 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959). Under the plain meaning of the Virginia statute, plaintiff's acceptance of the proffers resulted in legislative amendments to the zoning of a specified parcel of property. ***See Rinker v. City of Fairfax***, 238 Va. 24, 29, 381 S.E.2d 215, 217 (1989). The state statute authorizes the local government to accept

proffers in addition to general uniform regulations within a zoning district. If accepted, the restrictions become a part of the zoning regulatory framework for the property. Proffers become binding development restrictions on the developer until subsequent rezoning, or, as a matter of practicality, until development is stopped. Here, Congress' legislative taking precluded the planned development of the property. The National Park Service now manages the property, under federal title, as a federal park. The conditional zoning, along with the impacts that would justify that zoning, simply ceased to exist as of the date of the taking; they were not taken.

Admittedly, proffers may do more than merely mitigate the impacts of a specific proposed development. The

regulatory power of the county "is not limited to regulations designed to promote public health, public morals or public safety . . . but extends to so dealing with conditions which exist as to bring out of them the greatest welfare of the people. . . ." ***West Bros. Brick Co. v. County of Alexandria***, 169 Va. 271, 282, 192 S.E. 881, 885 ***appeal dismissed***, 302 U.S. 658 (1937), ***reh'g denied***, 302 U.S. 781 (1938). Developers may proffer certain conditions that represent property interests. However, a proffer, in and of itself, cannot be a property interest.

Plaintiff attempted by syllogism to convince this court that the proffers are property, arguing as follows:

> Plaintiff seeks compensation only for those proffers it believes constitute interests in land. In particular,

> plaintiff claims compensation, *inter alia*, for walking trails, a swimming pool, tennis courts and 5 acres of land. The conditions proffered are property interests. Therefore, proffers of those conditions necessarily must be property interests.

This argument is disingenuous. Proffers confer only those legislative expectancies existing in the zoning amendment itself. Zoning ordinances, and other government regulations controlling land development, are governmental restrictions, not the government's property. The restrictions governed Hazel's proposed development, and were not given unconditionally. Once the taking precluded the planned development, the restrictions no longer were relevant, and plaintiff's reasons for requiring the proffers became a nullity, thereby dissolving any "rights" plaintiff

eventually might have accrued. The language of Hazel's proffers, cited by plaintiff, supports this conclusion. Hazel's "development of the subject property [was] subject to the" proffers. This language fairly supports an interpretation that, once the development was cancelled, the proffered conditions no longer were required.[2]

Plaintiff alternatively claimed that its situation is akin to materialmen liens "taken" by the government.

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[2] Plaintiff argued that Hazel's $8.5 million expenditure on infrastructure development caused Hazel's rights under the conditional zoning to vest, thereby divesting plaintiff of any unilateral power to rezone. Therefore, plaintiff argued, its "rights" to the proffers also had vested. If Hazel's rights had, indeed, vested, a finding the court need not reach here, plaintiff could have enforced its zoning ordinances against Hazel. However, as discussed more fully *infra* section E, plaintiff cannot enforce its zoning ordinances against the United States.

Plaintiff cited to ***Armstrong v. United States***, 364 U.S. 40 (1960) for the proposition that the proffers attached by operation of law, and became a compensable property interest. In ***Armstrong***, the Court upheld the right of materialmen to collect the value of unrecorded liens on vessels taken by the government. Liens represent an interest in the underlying property, and attach directly to the underlying property. Perfected liens represent a recognized property interest. Proffers are not recognized property interests. In the case of a materialmen's lien, the contractor has provided materials and performed work on the property. The property acts as a security interest for the work performed to assure payment by the owner. In this case, Hazel performed

work on the Prince William Tract, but the Tract was not a security interest for the proffers. Plaintiff merely performed the legislative function of rezoning the land as conditioned by the proffers, but performed no work creating a lien which attached to the property through a security interest.

Therefore, the court finds that plaintiff did not have a vested property interest in the proffers. Although the court thinks this dispositive, it will address plaintiff's argument that the proffers represent, or are sufficiently analogous to previously recognized property interests. Specifically, plaintiff alleges that either:

1) Its acceptance of the proffers in conjunction with

rezoning constituted a valid dedication; or

2) Its interest was sufficiently analogous to a restrictive covenant to find a property interest.

The court will address each of these allegations in turn.

B. Proffers Do Not Constitute a Valid Dedication.

Plaintiff claimed that once it granted the rezoning, it was able to exercise ownership rights over the proffers. In essence, a dedication took place. The court does not agree. A dedication is the setting aside of land, or of an interest therein, to the public use; or a form of transfer by an owner to the public of a fee or lesser interest in land. ***City of Norfolk v. Meredith***, 204

Va. 485, 489, 132 S.E.2d 431, 434 (1963). Under Virginia law, in order to effect a dedication, the owner must have specific intent to dedicate an interest manifested by some unequivocal act. ***Greenco v. City of Virginia Beach***, 214 Va. 201, 204, 198 S.E.2d 496, 498 (1973). Plaintiff argued that Hazel's proffers, and plaintiff's subsequent acceptance via the granted rezoning, represented unequivocal acts. Accepting this allegation, ***arguendo***, the court finds that Hazel lacked the requisite intent needed to dedicate the proffered interests.

Where Hazel intended to dedicate property interests to plaintiff, it did so explicitly through signed deeds of dedication which were made separately from the proffers. While recognizing that the proffers also were signed

documents, the court is not persuaded by plaintiff's argument that the proffers, given pursuant to the zoning laws, amounted to dedications. By making proffers, rather than definitively dedicating the interests, Hazel recognized that in the event plaintiff granted its request for rezoning, the proffers would be mandatory conditions for developing the property. However, plaintiff conceded that at the time it accepted the proffers, it maintained its ability to rezone the property unilaterally. *See* Va. Code Ann. § 15.1-491(a). Therefore, Hazel could not have considered its proffers "dedications" knowing, as it did, that plaintiff later could rezone.

The Virginia legislature explicitly created separate laws for the treatment

of proffers and dedications. Hazel chose to dedicate some interests, but to proffer others. This court will not second guess the legislature, or Hazel, and therefore finds that proffers are not equivalent to dedications.

C. Proffers Are Not Sufficiently Analogous To Restrictive Covenants To Constitute A Property Interest.

Plaintiff claimed that proffers are analogous to restrictive covenants and therefore are compensable because under Virginia law, restrictive covenants are compensable property if taken by eminent domain. ***Meagher v. Appalachian Elec. Power Co.***, 195 Va. 138, 144, 77 S.E.2d 461, 465 (1953). In deciding plaintiff's claim, the court first must examine Virginia law with respect to restrictive covenants. The term restrictive covenant

universally signifies an agreement between two parties restricting the use of property or prohibiting certain uses. ***Black's Law Dictionary*** 1182 (5th ed. 1979). Land use covenants create rights and duties between the original promising parties. The covenantee's rights are called the benefit of the covenant, while the covenantor's duties are considered the burden of the agreement. 5 Powell, ***The Law of Real Property*** ¶ 670[2] (1990). If certain strict requirements are met, either the benefit or the burden may devolve on a successor to the property interest of either the covenantee or covenantor. When the benefit or burden devolves, it is said to "run with the land." ***Id.*** Otherwise, the covenant is considered personal between the parties, and will not devolve to any successors to

the property. Under Virginia law, a restrictive covenant exists if the covenant touches and concerns the land, there is privity of estate, and the parties intended the covenant to run with the land. ***Net Realty Holding Trust v. Franconia Properties, Inc.***, 544 F.Supp. 759, 762 (E.D. Va. 1982).

Defendant argued that proffers were not restrictive covenants but personal rights which did not attach to any particular estate in Hazel's property. The court must determine whether a covenant is a personal right, or attaches to a particular estate, by the fair interpretation of the grant aided, if necessary, by the situation of the property and the surrounding circumstance. ***See, e.g., Burton v. Chesapeake Box & Lumber Corp.***, 190 Va.

755, 57 S.E.2d 904 (1950). Had Hazel sold the property at issue, any new owner would have taken title subject to the proffers, and would have been permitted to develop the land only in accordance with the zoning. Proffers are noted in official zoning maps, can be recorded, and affect title. Therefore, the court does not believe that the proffers merely were collateral to the land, but that they did "touch and concern" the land.

However, in order for a covenant to run with the land, there must be privity of estate. Privity describes a relationship that must exist between the parties to a covenant. In Virginia, there must be mutual tenurial privity between the parties in order for real covenants to run with the land. 5 Powell, *The Law of Real Property*

¶ 673[2]. The concept of mutual tenurial privity arose from English common law under which the original covenantor, and his successors, were tenants of the landlord/covenantee. ***See Spencer's Case***, 77 Eng. Rep. 72 (QB 1583). The most demanding view of privity of estate, which Virginia follows, requires that this landlord-tenant relationship exist in order for the covenant to run with the land. ***See Tardy v. Creasy***, 81 Va. 553 (1886). The court cannot construe the relationship between plaintiff and Hazel as tenurial. Defendant is the owner of the property interest; plaintiff regulates that interest. Therefore, the court does not find the requisite privity of estate between plaintiff and Hazel. The court agrees with defendant that the proffers more closely are akin to

affirmative covenants which are created when the covenantor promises to perform an act upon his land which benefits land owned by covenantee. *See* Clark, ***Real Covenants and Other Interests Which "Run With Land"*** 97 (2d ed. 1947). Virginia follows the rule that the burdens of affirmative covenants do not run with the land, and therefore are not compensable property interests. *Id.* at 231.

This court recognizes that plaintiff did not claim that proffers are, in fact, restrictive covenants, but that they closely resemble restrictive covenants. In effect, plaintiff asked this court to find that a proffer is equivalent to an equitable servitude. An equitable servitude is a covenant that is enforceable in an action in equity. As opposed to real covenants which are said

to run with the land, an equitable servitude is treated as if the land itself had become burdened with the covenant. *See* Powell, *supra* at § 675(1). Therefore, the covenant is enforced in equity regardless of whether the parties have met the strict requirements needed to enforce a real covenant.

Equitable servitudes were created from the experience that the formalism of the rules for restrictive covenants were to narrow in their application. *Cheatham v. Taylor*, 148 Va. 26, 38-39, 138 S.E.2d 545, 549 (1927). However, covenants, express or implied, restricting the free use of land are not favored, and must be construed strictly. *Mid-State Equip. Co. v. Bell*, 217 Va. 133, 140, 225 S.E.2d 877, 884 (1976). The law places the burden on the party seeking the benefit

of those conditions to prove that they apply. *Id.* In order to find that an equitable servitude exists, the intent of the parties, especially that of the common grantor, determines the existence of the right. *See Minner v. City of Lynchburg*, 204 Va. 180, 187, 129 S.E.2d 673, 678 (1963). Plaintiff did no more than discuss, in general terms, the reasons this court should find that an equitable servitude exists, *i.e.*, equitable servitudes and proffers both are promises. Plaintiff pointed to no authority, nor has the court been able to find any, to sustain the contention that a zoning ordinance may be considered an equitable servitude. Additionally, while equitable servitudes may be broader than restrictive covenants, they generally are enforced through injunctive relief, not

monetary damages. The court is unwilling to find that the proffers are sufficiently analogous to either restrictive covenants, or equitable servitudes, to sustain plaintiff's claim.

D. Conditional Zoning Ordinances Are Not *Ultra Vires*.

In Virginia, the state legislature "may confer the police power of the state upon cities and towns." ***Gorieb v. Fox***, 145 Va. 554, 561, 134 S.E.2d 914, 916 (1926), ***aff'd***, 274 U.S. 603 (1927). By allowing the county to regulate land use, the legislature delegates part of its police powers. ***See National Realty Corp. v. City of Virginia Beach***, 209 Va. 172, 174-75, 163 S.E.2d 154, 156 (1968). However, the county's powers are created by statute, and are limited to those conferred expressly, or by necessary

implication. ***Hylton Enters. v. Board of Supervisors of Prince William County***, 220 Va. 435, 440, 258 S.E.2d 577, 581 (1979). Rather than treat the proffers merely as conditional zoning ordinances, plaintiff would have this court find that the proffers created a property interest which matured upon the rezoning of the Prince William Tract. Defendant argued that this theory for finding a property interest rests on contract zoning which is ***ultra vires*** (beyond the scope of plaintiff's legislative power) and ***void ab initio*** (an agreement which is null from the start).

Impermissible contract zoning results from a legislative authority bargaining away its zoning power. Under plaintiff's theory, the proffers constituted the developer's consideration

in a bargained-for exchange of plaintiff's rezoning approval. Defendant argued that, if plaintiff's interpretation is correct, plaintiff accepted the proffers in exchange for not enforcing its police powers because if the "property interest" matured upon rezoning, plaintiff would have surrendered its ability subsequently to rezone the Prince William Tract.[3] Contracts that impinge upon legislative or police powers are void. *See Mumpower v. Housing Auth. of City of Bristol*, 176 Va. 426, 452, 11 S.E.2d 732, 742 (1940).

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[3] Although plaintiff did not concede that, by accepting proffers, it gives up its ability to rezone, that would be the practical result of a "matured interest" unless plaintiff were to claim it has rights to the proffers even upon subsequent rezoning. That certainly cannot be what plaintiff intended.

Therefore, if the court accepts plaintiff's interpretation, it would have to find that plaintiff engaged in *ultra vires* activity.

The express arrangement -- proffers in exchange for rezoning -- presents a strong argument of characterizing this relationship as a contract. However, these agreements are adopted within the context of legislation that uses only regulatory language, and that does not give rise to contractual duties or obligations on the part of the governing body. The county cannot be presumed to cede away its regulatory authority upon accepting the proffers, therefore the proffers cannot be property interests which vested upon rezoning. No matter how favorably it interprets the Virginia zoning laws for plaintiff, the court

cannot find that the State intended proffers to be anything more than conditions for local zoning ordinances. In so holding, this court recognizes plaintiff's need to be able to tailor land use requirements closely to the characteristics of particular parcels of land. Local governing bodies, because of their knowledge of local conditions and the needs of their individual communities, must be allowed wide discretion in the enactment of zoning ordinances. *Accord Byrum v. Board of Supervisors of Orange County*, 217 Va. 37, 39, 225 S.E.2d 369, 371 (1976). Therefore, this decision in no way stands for the proposition that conditional zoning under Virginia law a is *ultra vires* and *void ab initio*.

E. Supremacy Clause

Defendant argued that the federal government took the Prince William Tract free of the local zoning ordinances, and that federal land uses are not subject to state or local land use laws, including zoning regulations, because of the superiority of the federal government over the states and their potential subdivision, *i.e.*, the Supremacy clauses of the United States Constitution, article VI, clause 2. *See* 6 Rohan, ***Zoning and Land Use Controls***, ¶ 40.03(1)(a). Plaintiff contended that the Supremacy Clause is not implicated in this case and argued that, while the federal government need not go through a rezoning process in order to use the land as a national park, it is not exempt from conditions existing on the property at

the time it took ownership. Plaintiff based this argument on the premise that proffers constitute property interests. Because the court has held that proffers are not property interests, plaintiff, were it to receive compensation from defendant, in effect, would be enforcing its zoning ordinance against the federal government.[4] This, plaintiff cannot do. *See, e.g., Washington & O.D.R.R. v. City of Alexandria*, 191 Va. 184, 191, 60 S.E.2d 40, 44 (1950).

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[4] Plaintiff as much as admitted this when it argued that Va. Code Ann. § 15.1-491(d) permits it to *enforce* its proffers through suits for civil damages, and by citing *Board of County Supervisors of Prince William County v. Sie-gray Developers, Inc.*, 230 Va. 24, 334 S.E.2d 542 (1985) for the proposition that, where a landowner voluntarily agrees to make certain improvements and fails to do so, the county can *enforce* completion.

Federal law preempts state law in three circumstances: 1) where Congress explicitly so provides; 2) where a state regulates conduct in a field that Congress intended to occupy exclusively; and 3) state law is preempted to the extent it actually conflicts with federal law. ***English v. General Elec. Co.***, 110 S. Ct. 2270, 2274-75 (1990). Plaintiff's claim falls within the third situation above. Plaintiff argued that, because the Act did not expressly deal with the zoning issue, the rule is not applicable. That argument is without merit. "Because of the fundamental importance of the principles shielding federal installations and activities from regulation by the States, an authorization of state regulation is found only when and to the extent that

there is a 'clear congressional mandate,' . [or] 'specific congressional action' that makes this authorization of state regulation 'clear and unambiguous.'" *Hancock v. Train*, 426 U.S. 167, 179 (1976) (footnotes omitted). The intent of the Act was to create a National Battlefield Park. Nothing in the Act suggests that defendant acquiesced to the County's local zoning powers on the federal park land. Absent "clear and unambiguous" intent to subject the land to local zoning ordinances, defendant simply is not subject to the regulations. This case presents a direct conflict between the County's local zoning ordinance, and the government's Act.

Plaintiff also argued that the United States "came to the property as a landowner [and] not a regulator." *See*

Forth Leavenworth R.R.& Co. v. Lowe, 114 U.S. 525 (1885). While that is true, it does not overcome the fact that plaintiff cannot enforce its zoning ordinances on federal land. *See Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976). When Federal law and State law conflict, Federal law must prevail.

CONCLUSION

The burden of proof was upon plaintiff, and it made an extraordinary effort to convince the court that a proffer is a property right, but failed. The court applauds the effort, but must rule in favor of defendant. For the reasons set forth above, the court grants defendant's motion for partial dismissal.

IT IS SO ORDERED.

/s/ Moody Tidwell
MOODY R. TIDWELL
Judge

16 USCS §429b

§ 429B. Manassas National Battlefield Park

(a) Establishment; boundaries. There is established as a unit of the national park system in the Commonwealth of Virginia the Manassas National Battlefield Park, which shall contain within its boundaries the important historical lands relating to the two battles of Manassas. The total area of the park shall not be greater than four thousand five hundred and twenty-five acres. The boundaries of the park shall be the boundaries depicted on the map entitled "Boundary Map, Manassas National Battlefield Park", dated October 1980, and numbered 379/80,009, which shall be on file and available for public inspection in the offices of the National

Park Service, Department of the Interior. The Secretary shall publish in the Federal Register, as soon as practicable after the date of the enactment of this Act, but no later than one year from the effective date of this section, a detailed description and map of the boundaries. Notwithstanding section 7(c) of the Land and Water Conservation Fund Act of 1965 (91 Stat. 211), as amended (16 U.S.C. 4601) [16 USCS §4601-9(c)] the Secretary may not make any changes in the boundaries of the park. The Secretary shall administer the park in accordance with the laws, rules, and regulations applicable to the national park system.

(b) **Addition to park.** (1) In addition to subsection (a), the boundaries of the park shall include the area, comprising approximately 600 acres,

which is south of U.S. Route 29, north of Interstate Route 66, east of Route 705, and west of Route 622. Such area shall hereafter in this Act [16 USCS §§ 429(b) et seq.] be referred to as the "Addition".

(2)(A) Notwithstanding any other provision of law, effective on the date of enactment of the Manassas National Battlefield Park Amendments of 1988 [enacted Nov. 10, 1988]; there is hereby vested in the United States all right, title, and interest in and to, and the right to immediate possession of, all the real property within the Addition.

(B) The United States shall pay just compensation to the owners

of any property taken pursuant to this paragraph and the full faith and credit of the United States is hereby pledged to the payment of any judgment entered against the United States with respect to the taking of such property. Payment shall be in the amount of the agreed negotiated value of such property or the valuation of such property awarded by judgment and shall be made from the permanent judgment appropriation established pursuant to 31 U.S.C. 1304. Such payment shall include interest on the value of such property which shall be compounded quarterly and

computed at the rate applicable for the period involved, as determined by the Secretary of the Treasury on the basis of the current average market yield on outstanding marketable obligations of the United States of comparable maturities from the date of enactment of the Manassas National Battlefield Park Amendments of 1988 [enacted Nov. 10, 1988] to the last day of the month preceding the date on which payment is made.

(C) In the absence of a negotiated settlement, or an action by the owner, within 1 year after the date of enactment of the Manassas

National Battlefield Park Amendments of 1988 [enacted Nov. 10, 1988], the Secretary may initiate a proceeding at anytime seeking in a court of competent jurisdiction a determination of just compensation with respect to the taking of such property.

(3) Not later than 6 months after the date of enactment of the Manassas National Battlefield Park Amendments of 1988 [enacted Nov. 10, 1988], the Secretary shall publish in the Federal Register a detailed description and map depicting the boundaries of the Addition. The map shall be on file and available for public inspection in the offices of

the National Park Service, Department of the Interior.

(c) Use of addition. The Secretary shall not allow any unauthorized use of the Addition after the enactment of the Manassas National Battlefield Park Amendments of 1988 [enacted Nov. 10, 1988], except that the Secretary may permit the orderly termination of all operations on the Addition and the removal of equipment, facilities, and personal property from the Addition.

(April 17, 1954, ch 153, § 1, 68 Stat. 56; Oct. 13, 1980, P.L. 96-442, § 2, 94 Stat. 1885; Nov. 10, 1988, P. L. 100-647, Title X, §10002, 102 Stat. 3810.)

Virginia Code § 15.1-491

§ 15.1-491. Permitted provisions in ordinances; amendments. -- A zoning ordinance may include, among other things, reasonable regulations and provisions as to any or all of the following matters:

(a) For variances as defined in § 15.1-430(p) or special exceptions as defined in § 15-1.430(i) to the general regulations in any district in cases of unusual situations or to ease the transition from one district to another, or for buildings, structures or uses having special requirements, and for conditional zoning as defined in § 15-1.430(q) and for the adoption, in counties, or towns, therein which have planning commissions, wherein the urban county executive form of government is in

effect, or in a city adjacent to or completely surrounded by such a county, or in a county contiguous to any such county, or in a city adjacent to or completely surrounded by such a contiguous county, or any town within such contiguous county, and in the counties east of the Chesapeake Bay as a part of an amendment to the zoning map of reasonable conditions, in addition to the regulations provided for the zoning district by the ordinance, when such conditions shall have been proffered in writing, in advance of the public hearing before the governing body required by §15-1-493 by the owner of the property which is the subject of the proposed zoning map amendment. Once proffered and accepted as part of an amendment to the zoning ordinance, such conditions shall

continue in effect until a subsequent amendment changes the zoning on the property covered by such conditions. However, such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance.

(a1) In the event proffered conditions include a requirement for the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, then no amendment to the zoning map for the property subject to such conditions, nor the conditions themselves, nor any amendments to the text of the zoning ordinance with respect to the zoning district applicable thereto

initiated by the governing body, which eliminate, or materially restrict, reduce, or modify the uses, the floor area ratio, or the density of use permitted in the zoning district applicable to such property, shall be effective with respect to such property unless there has been mistake, fraud, or a change in circumstances substantially affecting the public health, safety or welfare.

(a2) Any landowner who has prior to July 1, 1990, proffered the dedication of real property of substantial value, or substantial cash payments for or construction of substantial public improvements, the need for which is not generated solely by the rezoning itself, but who has not substantially implemented such proffers prior to July 1, 1990,

shall advise the local governing body by certified mail prior to July 1, 1991, that he intends to proceed with the implementation of such proffers. Such notice shall identify the property to be developed, the zoning district, and the proffers applicable thereto. Thereafter, any landowner giving such notice shall have until July 1, 1995, substantially to implement such proffers, or such later time as the governing body may allow. Thereafter, the landowner in good faith shall diligently pursue the completion of the development of the property. Any landowner who complies with the requirements of this subdivision shall be entitled to the protection against action initiated by the governing body affecting use, floor area ratio, and density set out in subdivision (a1), unless there has

been mistake, fraud, or a change in circumstances substantially affecting the public health, safety, or welfare, but any landowner failing to comply with the requirements of this subdivision shall acquire no rights pursuant to this section.

(a3) The provisions of subdivisions (a1) and (a2) of this section shall be effective prospectively only, and not retroactively, and shall not apply to any zoning ordinance text amendments which may have been enacted prior to March 10, 1990. Nothing contained herein shall be construed to affect any litigation pending prior to July 1, 1990, or any such litigation nonsuited and thereafter refiled.

Nothing in this section shall be construed to affect or impair the authority of a governing body to:

1. Accept proffered conditions which include provisions for timing or phasing of dedications, payments, or improvements; or

2. Accept or impose valid conditions pursuant to subsection (c) of this section, subsection H of §15.1-466, or other provision of law.

(b) For the temporary application of the ordinance to any property coming into the territorial jurisdiction of the governing body by annexation or otherwise, subsequent to the adoption of the zoning ordinance, and pending the orderly amendment of the ordinance.

(c) For the granting of special exceptions under suitable regulations and

safeguards; and notwithstanding any other provisions of this article, the governing body of any city, county or town may reserve unto itself the right to issue such special exceptions.

(d) For the administration and enforcement of the ordinance including the appointment or designation of a zoning administrator who may also hold another office in the county or municipality. The zoning administrator shall have all necessary authority on behalf of the governing body to administer and enforce the zoning ordinance, including the ordering in writing of the remedying of any condition found in violation of the ordinance, and the bringing of legal action to insure compliance with the ordinance, including

injunction, abatement, or other appropriate action or proceeding.

(e) For the imposition of penalties upon conviction of any violation of the zoning ordinance. Any such violation shall be a misdemeanor punishable by a fine of not less than $10 nor more than $1,000.

(f) For the collection of fees to cover the cost of making inspections, issuing permits, advertising of notices and other expenses incident to the administration of a zoning ordinance or the filing or processing of any appeal or amendment thereto.

(g) For the amendment of the regulations or district maps from time to time, or for their repeal. Whenever the public necessity, convenience, general welfare, or good zoning practice require,

the governing body may by ordinance amend, supplement, or change the regulations, district boundaries, or classifications of property. Any such amendment may be initiated (i) by resolution of the governing body, or (ii) by motion of the local commission, or (iii) by petition of the owner, contract purchaser with the owner's written consent, or the owner's agent therefor, of the property which is the subject of the proposed zoning map amendment, addressed to the governing body or the local commission, who shall forward such petition to the governing body; provided, that the ordinance may provide for the consideration of proposed amendments only at specified intervals of time, and may further provide that substantially the same petition will not be reconsidered

within a specific period, not exceeding one year. Any such resolution or motion by such governing body or commission proposing the rezoning shall state the above public purposes therefor.

In any county having adopted such zoning ordinances all motions, resolutions or petitions for amendment to the zoning ordinance, and/or map shall be acted upon and a decision made within such reasonable time as may be necessary which shall not exceed twelve months unless the applicant requests or consents to action beyond such period or unless the applicant withdraws his motion, resolution or petition for amendment to the zoning ordinance or map, or both. In the event of and upon such withdrawal, processing of the motion, resolution or petition shall cease without further

action as otherwise would be required by this subsection.

(h) For the submission and approval of a plan of development prior to the issuance of building permits to assure compliance with regulations contained in such zoning ordinance.

(i) For areas and districts designated for mixed use developments as defined in § 15.1-430(r) and planned unit developments as defined in § 15.1-430(s).

(j) For the administration of incentive zoning as defined in § 15.1-430(t).

The ordinance may also provide that petitions brought by property owners, contract purchasers or the agents thereof, shall be sworn to under oath before a notary public or other official before whom oaths may be taken, stating

whether or not any member of the local planning commission or governing body has any interest in such property, either individually, by ownership of stock in a corporation owning such land, partnership, as the beneficiary of a trust, or the settlor of a revocable trust or whether a member of the immediate household of any member of the planning commission or governing body has any such interest. (Code 1950, § 15-968.5; 1962, c. 407; 1964, c. 564; 1966, c. 455; 1968, cc. 543, 595; 1973, c. 286; 1974, c. 547; 1975, cc. 99, 575, 579, 582, 641; 1976, cc. 71, 409, 470, 683; 1977, c. 177; 1978, c. 543; 1979, c. 182; 1982, c. 44; 1983, c. 392; 1984, c. 238; 1987, c. 8, 1988, cc. 481, 856; 1989, cc. 359, 384; 1990, cc. 672, 868; 1992, c. 380.)

Virginia Code § 15.1-478

§ 15.1-478. Recordation of plat as transfer of streets, termination of easements and rights-of-way, etc. -- The recordation of such plat shall operate to transfer, in fee simple, to the respective counties and municipalities in which the land lies such portion of the premises platted as is on such plat set apart for streets, alleys or other public use and to transfer to such county or municipality any easement indicated on such plat to create a public right of passage over the same; but nothing contained in this article shall affect any right of a subdivider of land heretofore validly reserved.

Provided, that where the authorized officials of a county, town or city within which land is located, approve in

accordance with the subdivision ordinances of such county, town or city a plat or replat of land therein, then upon the recording of such plat or replat in the Clerk's office wherein land records are maintained, all rights-of-way, easements or other interest of the county, town or city in the land included on the plat or replat, except as shown thereon, shall be terminated and extinguished, except that an interest acquired by the county, town or city by condemnation, by purchase for valuable consideration and evidenced by a separate instrument of record, or streets, alleys or easements for public passage subject to the provisions of § 15.1-481 or §15.1-482 shall not be affected thereby. (Code 1950, § 15-792; Code 1950, § 15-967.13;

1958, c. 460; 1962, c. 407; 1964, c. 564; 1974, c. 530; 1978, c. 590.)

Prince William County Code

32-700.30. Conditional Zoning.

(1) Any applicant for a zoning map amendment (rezoning) may, as a part of his application, proffer reasonable conditions concerning the use and development of his property, including also off-site improvements that may serve or benefit his property and the public welfare. Proffers shall be signed and acknowledged by the owner of the property or any agent authorized by a power of attorney meeting the requirements of subsection 32-700.03(1)(c).

(2) Every proffer statement shall state that the applicant proffers that use and development of the property shall be in strict accordance with the proffered conditions. Any revised proffer statements shall state that it

supersedes any proffer statements previously submitted and shall either show the revisions by appropriate annotation on its face or by reference to a narrative description of changes submitted at the same time. In the event the applicant proffers to develop and use his property in accordance with the schematic land use plan, or other plans, proffers, elevations, demonstrative materials and written statements submitted as part of the general development plan, the proffer statement shall so state and each copy of such materials shall so provide, in accordance with the provisions of the adopted proffer policy. In the event of an inconsistency between a specific written proffer and a depiction upon a proffered

general development plan, the proffered text shall control.

(3) The board of county supervisors, when acting on an application for a zoning map amendment, may adopt as a part of the zoning map the proffered conditions, in whole or in part, set forth by the applicant. Once adopted by the board of county supervisors, such proffered conditions shall be binding on the use and development of the property, and shall continue in full force and effect until a subsequent amendment changes the zoning on the property covered by such conditions; provided, however, that such conditions shall continue if the subsequent amendment is part of a comprehensive implementation of a new or substantially revised zoning ordinance and/or map.

(4) Proffered conditions adopted by the board of county supervisors shall be in addition to the regulations provided for the zoning district by the text of this chapter. Except as standards may have been expressly waived by the board of county supervisors, as part of a rezoning or special use permit approval, development shall conform to mandatory standards in effect at the time of final plan approval if such standards exceed proffered conditions accepted at the time of rezoning.

(5) The zoning map, and other appropriate files maintained by the zoning administrator, shall reference the existence of adopted proffered conditions attached to various properties. Any site plan, subdivision plan, development plat or permit application thereafter

submitted for development of property to which proffered conditions have attached shall conform with all such conditions, and shall not be approved by any county official in the absence of such conformity. For the purpose of this section, conformity shall mean such conformity which leaves a reasonable margin of adjustment due to final engineering data, but conforms with the general nature and intent of the development, the specific uses, and the general layout depicted by the plans, profiles, elevations, and other demonstrative materials presented by the applicant.

3. Trails

A community trail system shall be provided which shall have natural and/or all-weather surface and shall be designed with several internal loops to facilitate pedestrian movements through the mixed-use development. To the extent practicable this system shall link points of historical/archaeological significance.

6. Recreation

A community swimming pool/center, two tennis courts and two multi-purpose courts will be provided/constructed in the approximate location designated as active recreation area on the Master PMD Zoning Plan. In addition, a multi-purpose ballfield shall be provided, which may be constructed within the VEPCO easement proximate to

the commuter parking lot. These facilities shall be in fulfillment of County recreation requirements.

9. On-Site Roadway Improvements

(a) Applicant shall proceed forthwith, subject to the availability of rights-of-way and easements and receipt of necessary governmental approvals and permits, to design and construct, in accordance with applicable VDH&T criteria/standards, William Center Boulevard (i.e., designated Road A in applicant's traffic report dated June 17, 1986) to a four-lane divided section from its intersection with Groveton Road to, if applicable, the I-66/Route 234 Bypass interchange. If the design for said interchange does not provide for a direct connection to William Center Boulevard, applicant shall extend said road to/from

Route 29 or alternative off-site intersection, with appropriate right- and left-turn deceleration lanes and traffic signalization/controls at the eastern and western termini/intersections.

(b) If requested by the County and approved by the County and approved by the Virginia Department of Highways and Transportation ("VDH&T") at or prior to final subdivision plat/site plan approval, applicant or assigns shall (i) dedicate approximately 4.5 acres of right-of-way for the construction of the Route 234 Bypass; and (ii) provide construction and grading easements for the planned roadway improvement which will terminate upon completion of said improvement. The dedication referenced in (i) above shall be generally located

along subject property's western/southwestern boundary.

(c) Upon commencement of general construction activities, a construction road suitable for construction traffic shall be provided in the general location of the easternmost entrance on Route 29 as shown on the Master PMD Zoning Plan.

10. Off-Site Roadway Improvements

(a) Upon occupancy of 500,000 gross square feet (GSF) of residential and/or nonresidential uses, applicant shall construct an additional eastbound and a westbound land on Route 29 and a northbound lane on Route 234 at the Route 234/Route 29 intersection. Said commitment shall be subject to (i) the availability of sufficient right-of-way and/or necessary easements from the

National Park Service; and (ii) no reconstruction/revision to the existing box culvert and/or vertical or horizontal alignments/cross-sections of Route 234 at Young's Branch.

(b) Upon occupancy of 1.5 million GSF of residential and/or nonresidential uses, applicant shall (i) reconstruct/improve Groveton Road to a two-lane undivided section beginning at the southern terminus of the Groveton Road Bridge at I-66 southward to the Route 621/Route 622 intersection; (ii) construct a southbound right-turn lane at the Route 621/Route 622 intersection which shall extend approximately 800 feet from the referenced intersection; (iii) construct right- and left-turn deceleration lanes at the other two entrances on Route 29 as delineated on

the referenced Plan; and (iv) upgrade Groveton Road to a four-lane undivided section from its intersection with William Center Boulevard and extending approximately 850 feet southward to the northern terminus of the Groveton Road Bridge at I-66. The aforesaid roadway improvements referenced in (i) and (iv) above shall include no reconstruction/improvement to the Groveton Road Bridge.

(c) Upon occupancy of 2.5 million GSF of residential and/or nonresidential uses, applicant shall (i) upgrade William Center Boulevard to a six-lane divided section from its respective intersections with Route 29 (or with the I-66/Route 234 Bypass interchange) and Groveton Road for a distance of approximately 1500 feet (or

comparable distance as determined by VDH&T) and 1800 feet respectively; and (ii) construct an additional eastbound and westbound lane at the Route 621/Route 622 intersection which shall extend approximately 915 feet and 410 feet, respectively, from the referenced intersection.

14. Route 234 Bypass/I-66 Interchange

Applicant shall contribute a total of $2,000,000.00 towards the construction of the proposed I-66/Route 234 Bypass interchange under the circumstances and in the time frames set forth below, which obligation shall be subject to the credits and conditions precedent also set forth below:

(a) Upon the issuance of occupancy permits for a cumulative total

of 1 million GSF of nonresidential use, applicant shall provide Prince William County $500,000.00 as aforesaid;

(b) Upon the issuance of occupancy permits for a cumulative total of 1.5 million GSF of nonresidential use, applicant shall provide Prince William County an additional $500,000.00 as aforesaid;

(c) Upon the issuance of occupancy permits for a cumulative total of 2.2 million GSF of nonresidential use, applicant shall provide Prince William County an additional $1,000,000.00 as aforesaid;

(d) Applicant's obligation to provide the aforesaid contributions at the times specified shall be contingent upon (i) with respect to subparagraphs a and b above, the existence of an approved

final design of the aforesaid interchange. and the inclusion in said design of provision for direct ingress and egress westbound and eastbound to and from subject property by way of a ramp system directly into and out of subject property; (ii) with respect to subparagraph c above, the availability and commitment of funds by Prince William County and others sufficient to provide for 75% of the cost of right-of-way acquisition and construction of said interchange and associated access improvements. The aforesaid notwithstanding, if the conditions precedent set forth in (i) and (ii) immediately above have not been met by Prince William County at the times set forth in subparagraphs a, b, and c above, applicant's obligation to make the

contributions pursuant to subparagraphs a, b, and c above shall be cumulative and shall continue as an obligation of the applicant until the aforesaid conditions precedent shall have been met by the County, at which time(s) the contributions shall be made by the Applicant. If Prince William County completes the design and construction provisions for said interchange as set forth in (i) and (ii) immediately above prior to the applicant's phased development/contribution program as specified in subparagraphs a, b, and c above, applicant's obligation to make the aforesaid contributions shall continue and be payable to Prince William County at the times set forth in a, b, and c above, respectively.

20. Public Land Dedication

Applicant shall provide a total of five (5) acres within the employment component of subject property for a fire station and a commuter parking lot or such other public facility as shall be mutually agreed upon by and between Prince William County and the applicant.

IN THE UNITED STATES CLAIM COURT

No. 610-89 L

PERCH ASSOCIATES LIMITED PARTNERSHIP, MASON ASSOCIATES GENERAL PARTNERSHIP, YORK LIMITED PARTNERSHIP, AND TYSON-MCLEAN ASSOCIATES LIMITED PARTNERSHIP
Plaintiffs

FILED
DEC 18 1990

JUDGMENT

MARRIOTT CORPORATION
Intervenor

v.

THE UNITED STATES
Defendant

Pursuant to the court's order of December 17, 1990, allowing the joint motion, filed December 17, 1990, for entry of final judgment.

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that Perch Associates Limited Partnership (as agent for all plaintiffs) recover of and from the United States the sum of $67,630,000, plus $13,254,995 in interest on such sum

compounded quarterly from November 10, 1988 until December 16, 1990, as provided for 16 U.S.C. § 429b, and $19,152.76 in per diem interest thereafter.

IT IS FURTHER ORDERED AND ADJUDGED that intervenor, Marriott Corporation, recover of and from the United States the sum of $2,370,000, plus $464,543 in interest on such sum compounded quarterly from November 10, 1988 until December 16, 1990, as provided for in 16 U.S.C. § 429b, and $671.24 in per diem interest thereafter.

No costs, fees or expenses.

Frank T. Peartree

Clerk of Court

December 18, 1990 By /s/Linda A. Eddin
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RUSCC 72. Filing fee is $105.00

FILED
JUL 21 1995
CLERK

(3)

No. 94-1921

In the Supreme Court of the United States

OCTOBER TERM, 1995

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW S. DAYS, III
Solicitor General
LOIS J. SCHIFFER
Assistant Attorney General
JOHN A. BRYSON
JACQUES B. GELIN
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

15 pp

QUESTION PRESENTED

Whether "proffers" that a landowner submits to a county, in order to induce that county to rezone a tract of land, are "property" of the county for which the United States must pay just compensation when it acquires the tract from the landowner by eminent domain.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 94-1921

BOARD OF COUNTY SUPERVISORS OF PRINCE WILLIAM COUNTY, VIRGINIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 48 F.3d 520. The opinion of the United States Claims Court (now the Court of Federal Claims)[1] dismissing petitioner's claim (Pet. App. 47a-87a) is reported at 23 Cl. Ct. 205. The opinion

[1] This action was commenced in the United States Claims Court. Pet. App. 47a. The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506, renamed that court "Court of Federal Claims." For convenience, we will use the trial court's new name to refer to proceedings held and decisions rendered by it and its predecessor.

of the United States Claims Court denying petitioner's motion for reconsideration (Pet. App. 39a-46a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 1995. The petition for a writ of certiorari was filed on May 22, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The William Center Tract is a 550-acre property adjacent to the Civil War battlefield at Manassas, in Prince William County, Virginia. In 1986, the owner of the tract (the landowner) submitted "proffers" to petitioner, the Board of County Supervisors of Prince William County, to induce petitioner to rezone the tract from agricultural to Planned Mixed Use (permitting a mixture of commercial, office, and residential uses). Under Virginia law, "proffers" are commitments made by a developer to a zoning authority in order to mitigate anticipated development impacts. The landowner's proffers in this case included, among other things, providing for open spaces, community trails, and recreation facilities, undertaking certain road improvements (or compensating petitioner for their construction), contributing to the funding of local public schools, and providing five acres for a fire station and a commuter parking lot or other public facility. Petitioner granted the landowner's request to rezone the tract for development. Pet. App. 4a-7a, 48a-52a.

When the landowner proposed to construct a much larger development on the tract than originally proposed, a citizens coalition persuaded Congress to

enact the Manassas National Battlefield Park Amendments of 1988, Title X of the Technical and Miscellaneous Revenue Act of 1988, Pub. L. No. 100-647, § 10002(2), 102 Stat. 3810, codified at 16 U.S.C. 429b(b). See Pet. App. 52a-53a. That Act vested in the United States, as an addition to the Manassas Battlefield National Park, all right, title and interest in and to, and the right to immediate possession of, the William Center Tract. The Act further obligated the United States to "pay just compensation to the owners of any property taken pursuant to this [Act] and * * * pledged * * * the payment of any judgment entered against the United States with respect to the taking of such property." 16 U.S.C. 429b(b)(2)(B).

2. The landowner and petitioner filed separate suits in the United States Court of Federal Claims (CFC) seeking compensation claimed to be due them. Petitioner sought $2 million for 16.05 acres of rights of way that had been conveyed to it. Petitioner also sought compensation for the proffers, alleging, *inter alia*, that the proffers constituted a property interest of which it was deprived as a result of Congress's decision to exercise its power of eminent domain. No value was assigned to the proffers. See Complaint ¶ 10.

The United States settled the developer's suit, but declined to pay petitioner for either the value of the proffers or the 16.05 acres of rights of way that had been conveyed to it in fee. On June 3, 1991, the CFC issued a partial summary judgment dismissing petitioner's claim relating to the proffers. Pet. App. 47a-87a. The court reasoned that Virginia law is clear that the effect of a proffer is not to create property rights in the zoning authority, but simply to incorporate the agreed-upon restrictions as part of

the zoning plan for the jurisdiction. *Id.* at 60a-61a. Because local zoning codes do not apply to property that is owned by the United States, the court concluded that the restrictions "simply ceased to exist as of the date of the taking; they were not taken." *Id.* at 61a, 83a-84a. The court also concluded that Virginia law did not support petitioner's claims that the proffers amounted to a "dedication" of property for public use (*id.* at 67a-70a), or that the proffers were equivalent to restrictive covenants (*id.* at 70a-78a).

On December 18, 1992, the CFC issued a second opinion dismissing the remainder of petitioner's suit (relating to the rights of way). 27 Fed. Cl. 339. The court reasoned that the proposed development at the William Center Tract will never take place and there is no longer any need for petitioner to build roads. Because petitioner failed to show that it could devote the rights of way that had been dedicated for use as public roads to other, more profitable uses, the court concluded that petitioner was entitled only to nominal compensation for that property.

3. Petitioner appealed both decisions, and the court of appeals affirmed in part, reversed in part, and remanded. Pet. App. 1a-38a. The court first held that proffers are neither contract rights nor analogous to a security interest, like a materialmen's lien. The court explained that petitioner's acceptance of the proffers was simply the exercise of delegated zoning authority under Virginia law, which could not fairly be "overla[id] * * * with a contract veneer" (*id.* at 17a), and noted that "[t]he object of the proffers in this case was not to give [petitioner] something of intrinsic value with which it could go into the market place and trade, or which it could use and possess for

county purposes" (*id.* at 20a-21a). Rather, "the proffers, when incorporated[,] as Virginia law provides[,] into the ordinance granting the rezoning, gave [petitioner] the power to enforce the ordinance as enacted. That power [petitioner] could not sell, give away, or transfer. Such enforcement rights arise out of and are defined by [petitioner's] exercise of the police power." *Id.* at 23a-24a. Accordingly, the court concluded that petitioner "did not 'own' any interests by virtue of the proffers," and that "[t]he trial court was correct in dismissing [petitioner's] claim regarding the proffers." *Id.* at 25a-26a.

The court of appeals reversed, however, the trial court's ruling with respect to the 16.05 acres that the landowner conveyed to petitioner for use as rights of way. Because that property was conveyed to petitioner by the landowner in fee simple, the court concluded, "[i]t matters not that the parties contemplated that the property would be used for a particular purpose." Pet. App. 32a. "[A]s a matter of property law," the court noted, petitioner "was free * * * to do with the property what it wished." *Id.* at 33a-34a. The court therefore remanded for a determination of the just compensation due petitioner for the taking of rights of way that it held in unencumbered fee simple. *Id.* at 38a.

ARGUMENT

The holding of the court of appeals on the narrow issue presented by petitioner—that proffers accepted by a Virginia local government in connection with rezoning do not constitute "property" within the meaning of the Fifth Amendment—is correct and does not conflict with a decision of any court of appeals or of this Court. Further review is not warranted.

1. While the meaning of "property" in the Fifth Amendment is a federal question, ordinarily federal courts look to local law to resolve whether rights amounting to "property" have been taken. *United States ex rel. T.V.A.* v. *Powelson*, 319 U.S. 266, 279 (1943). In this case, both courts below correctly concluded that nothing in Virginia law supports petitioner's claim that the proffers conferred property rights upon petitioner. That is because a local government's acceptance of proffers effects a legislative rezoning under Virginia law. See *Rinker* v. *City of Fairfax*, 381 S.E.2d 215, 217 (Va. 1989). Thus, once accepted, proffers simply become part of the zoning restrictions that apply to the property. Zoning is a non-compensable exercise of the legislative will, not "property" within the meaning of the Fifth Amendment. Moreover, as the Virginia courts have recognized, local zoning restrictions do not apply to property owned by the United States. See Pet. App. 83a-84a (citing *Washington & Old Dominion R.R.* v. *City of Alexandria*, 60 S.E.2d 40, 44 (Va. 1950)); see also 6 P. Rohan, *Zoning and Land Use Controls* ¶ 40.03(1)(a) (1995). The Court of Federal Claims was therefore assuredly correct in concluding that petitioner's zoning restrictions, including the proffers made by the former owner of the William Center Tract, "simply ceased to exist as of the date of the taking; they were not taken." Pet. App. 61a.

That analysis is not impugned by petitioner's claim that, by virtue of the proffers, it acquired valuable rights that it could have enforced against the owner of the property if the development had not been terminated by Congress's action. Pet. 30, 31, 38. This Court has repeatedly recognized that "the existence of value alone does not generate interests protected

by the Constitution against diminution by the government." *Reichelderfer* v. *Quinn*, 287 U.S. 315, 319 (1932). Indeed, in circumstances like those present here, where the claimed loss is simply a consequential injury from the condemnation of the property of another, this Court has long held that no compensation is due. That principle is illustrated by *Omnia Commercial Co.* v. *United States*, 261 U.S. 502 (1923), where this Court held that the United States was not liable to a third party for the frustration of a contract to purchase a large quantity of steel from a steel manufacturer at a favorable price when the government requisitioned the steel company's entire product for a year. "[F]or consequential loss or injury resulting from lawful government action," the Court said, "the law affords no remedy." *Id.* at 510. The Court went on to explain (*id.* at 511):

> In exercising the power to requisition, the Government dealt only with the Steel Company, which company thereupon became liable to deliver its product to the Government, by virtue of the statute and in response to the order. As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended.

Similarly, in *Mitchell* v. *United States*, 267 U.S. 341 (1925), the government condemned land used by the plaintiffs in their business of growing and canning corn of a special grade and quality. After receiving just compensation for the value of their land, the plaintiffs filed suit for additional recovery for the loss of their canning business, which was destroyed because no other land in the vicinity was suitable for

growing high-quality corn. The Court, after noting that "settled rules of law" precluded consideration of "consequential damages" for losses of a business or its destruction, stated (267 U.S. at 345):

> No recovery therefor can be had now as for a taking of the business. There is no finding as a fact that the Government took the business, or that what it did was intended as a taking. If the business was destroyed, the destruction was an unintended incident of the taking of land.

And in *United States ex rel. T.V.A.* v. *Powelson*, *supra*, the Court held that the United States was not required to compensate a property owner for loss of its privilege to use the State's power of eminent domain to acquire several tracts together with the tract condemned to form a multiple-dam, hydro-electric plant project, explaining (319 U.S. at 281):

> This public project, to be sure, has frustrated respondent's plan for the exploitation of its power of eminent domain. We may assume that that privilege was a thing of value and that this frustration of the plan means a loss to respondent. But our denial of compensation for that loss does not make this an exceptional case in the law of eminent domain. There are numerous business losses which result from condemnation of properties but which are not compensable under the Fifth Amendment.

After adverting to its rulings in the *Omnia* and *Mitchell* cases, *id.* at 281-283, and reaffirming their rule on the non-compensability of consequential damages, the Court found "no reason based on precedent or principle * * * why respondent's privilege to use

the power of eminent domain should be treated as 'private property' within the meaning of the Fifth Amendment so as to give rise to a private claim against the public treasury." *Id.* at 283.[2]

As the lower courts correctly concluded, there is no reason for a different conclusion with respect to petitioner's exercise of its statutory zoning authority under Virginia law. Thus, far from creating "new Federal law * * * about what constitutes a compensable property interest" (Pet. 19), as petitioner contends, the result reached by those courts is completely consistent with the controlling decisions of this Court.

2. There is no merit to petitioner's contention (Pet. 14, 46) that the court of appeals' conclusion conflicts with *United States* v. *50 Acres of Land*, 469 U.S. 24 (1984), because it means that public condemnees are not entitled to similar treatment as private condemnees. In *50 Acres*, a municipality whose landfill was condemned by the United States argued that the government was required to pay it the cost of acquiring a substitute facility. The Court held that the municipality was not entitled to that measure of compensation (which concededly would have applied if the government had taken property for which there was no market, such as streets), because there was "a fairly robust market for sanitary landfill

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[2] Numerous other cases affirm the proposition that consequential damages that result from the taking of property by the federal government are not compensable under the Fifth Amendment even when, as petitioner asserts was the case here, the claimant has lost a valuable expectancy. See, *e.g.*, *United States* v. *Petty Motor Co.*, 327 U.S. 372, 377-378 (1946); *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933); *Bothwell* v. *United States*, 254 U.S. 231, 233 (1920).

properties." *Id.* at 30. That holding has no relevance to the court of appeals' ruling, which turned on petitioner's failure to meet a threshold requirement for compensation that applies equally to private and public condemnees—the taking of "property." The reason petitioner is not entitled to compensation for the loss of the proffers is not that it is being treated differently from private condemnees, but that it is being treated in the same manner as private condemnees who lose business opportunities and expectations as a result of a taking.

There is no greater force to petitioner's claim (Pet. 37) that the decision below is inconsistent with *Armstrong* v. *United States*, 364 U.S. 40 (1960). *Armstrong* held that the government's destruction of certain materialmens' liens was a compensable taking of property interests within the meaning of the Fifth Amendment. *Id.* at 44-46. Liens, however, generally give the holder the right "to resort to the specific property" for satisfaction of the claims they secure (*id.* at 44; see also *Louisville Joint Stock Land Bank* v. *Radford*, 295 U.S. 555, 589-590 (1935)). By contrast, Virginia law provides only that the restrictions reflected in the proffers become part of the legislative rezoning of the tract. See Pet. App. 14a-15a, 17a, 60a. Petitioner's disagreement with that interpretation of Virginia law, in which both courts below concurred, does not merit this Court's review. Cf. *Bishop* v. *Wood*, 426 U.S. 341, 345-346 (1976).[3]

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[3] Petitioner's alternative argument (Pet. 38-39), that the proffers were analogous to restrictive covenants, is also without merit. In Virginia, restrictive covenants are compensable property if taken by eminent domain. *Meagher* v. *Appalachian Electric Power Co.*, 77 S.E.2d 461, 465 (Va. 1953) (reviewing

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Assistant Attorney General

JOHN A. BRYSON
JACQUES B. GELIN
Attorneys

JULY 1995

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authorities). To qualify as property, however, the benefit or burden must "run with the land." 5 R. Powell, *The Law of Real Property* ¶ 673[2] (1994); see *Net Realty Holding Trust* v. *Franconia Properties*, 544 F. Supp. 759, 762 (E.D. Va. 1982). Because of the lack of the requisite privity of estate between petitioner and the developer, the Court of Federal Claims correctly found that the proffers were more closely akin to affirmative covenants, which are created when the covenantor promises to perform an act upon his land which benefits land owned by the covenantee. See C. Clark, *Real Covenants and Other Interests Which "Run With Land"* 97, App. I (2d ed. 1947) at 213-232. In Virginia, the burdens of affirmative covenants do not run with the land. See, *e.g.*, *Tardy* v. *Creasy*, 81 Va. 553, 562 (1886).